Supreme Court, U.S.
FILED

No. (1)

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IN THE

Supreme Court of the United States

October Term, 1997

FLUOR DANIEL (NPOSR), INC.,
a Delaware Corporation,

Petitioner,

vs.

DAVID G. SEWARD

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wyoming

PETITION FOR WRIT OF CERTIORARI

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104 pp

QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require more than a *pro forma* review of a motion to set aside an entry of default and a default judgment where a substantive right to review based upon excusable neglect is provided by state rules of procedure, and this Court has adopted an appropriate and more liberal standard of excusable neglect to be applied under the Federal Rules of Civil Procedure after which the state rules of procedure are modeled?

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONER

Petitioner, Fluor Daniel (NPOSR), Inc., is a wholly-owned subsidiary of Fluor Daniel, Inc., a corporation organized and existing under the laws of the State of California. Petitioner has no nonwholly owned subsidiaries.

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Petitioner, Fluor Daniel (NPOSR), Inc., a Delaware corporation, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Wyoming entered in this matter on May 5, 1998, denying its petition for a rehearing on the decision rendered by that court on April 10, 1998 in *Fluor Daniel (NPOSR), Inc. v. Seward*, No. 97-18 (Wyo. Sup. Ct. April 10, 1998).

OPINIONS BELOW

The order of the Supreme Court of Wyoming denying the petition of Petitioner for a rehearing is attached as Appendix A. The decision of the Supreme Court of Wyoming on which Petitioner sought a rehearing is attached as Appendix B and is officially reported in the Pacific Reporter, Second Series, as *Fluor Daniel (NPOSR), Inc. v. Seward*, 956 P.2d 1131 (Wyo. 1998). Other relevant orders of the Supreme Court of Wyoming, which were entered in conjunction with the order sought to be reviewed, include the order of the Clerk of the Supreme Court of Wyoming assigning the case to the expedited docket and the order of the Supreme Court of Wyoming denying a motion of Petitioner to reassign the case to the oral argument docket. These orders are attached as Appendices C and D, respectively.

Other relevant judgments, orders, and decisions that were entered or filed in the Seventh Judicial District Court in and for Natrona County, Wyoming (in which the case was originally commenced) and that Petitioner believes are essential to an understanding of this Petition include: (a) The Order of the Seventh Judicial District Court in and for Natrona County, Wyoming denying the motion of Petitioner to set aside the entry of default and the default judgment against Petitioner in the state district court case; (b) The Decision Letter of the Seventh Judicial District Court in and for Natrona County, Wyoming on the motion of Petitioner to set aside the entry of default and the default judgment; (c) The Default Judgment of the Seventh Judicial District Court in and for Natrona County, Wyoming; and (d) The Entry of De-

fault of the Clerk of the Seventh Judicial District Court in and for Natrona County, Wyoming. These pleadings are attached as Appendices E, F, G, and H, respectively.

STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks review of an order entered by the Supreme Court of Wyoming on May 5, 1998, denying its petition for a rehearing on a decision rendered by that court on April 10, 1998. The latter decision affirmed a $562,489.00 default judgment that a Wyoming district court had entered against Petitioner and a subsequent order of the district court denying a motion of Petitioner to set aside both the entry of default and the default judgment against Petitioner under the provisions of Rules 55(c) and 60(b) of the Wyoming of Rules of Civil Procedure. The jurisdiction of this Court to review the order and the decision of the Supreme Court of Wyoming is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1 (1868):

Section 1

Citizenship Rights Not to Be Abridged by States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 55(c), Wyo. R. Civ. P. Defaults:

(c) *Setting aside default.* -- For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b), Wyo. R. Civ. P. Relief from judgment or order:

(b) *Other reasons.* -- On motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not af-

fect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding as provided by statute, or to grant relief to a party against whom a judgment or order has been rendered without other service than by publication as provided by statute. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 55(c), Fed. R. Civ. P. Default:

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b), Fed. R. Civ. P. Relief From Judgment or Order:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or

other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant, not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

On September 6, 1996, David G. Seward (Seward) filed a wrongful termination action against Fluor Daniel (NPOSR), Inc. (Fluor Daniel) in the Seventh Judicial District Court in and for Natrona County, Wyoming, sitting in Casper, Wyoming. Appendix B, at pp. 5a-6a. Process was served on September 9, 1996, by personal service upon The Prentice-Hall Corporation System, Inc. (Prentice-Hall), Fluor Daniel's registered agent for service of process in Cheyenne, Wyo-

ming. Appendix B, at p. 6a; Appendix K, at p. 51a. On the same date, Prentice-Hall sent the summons and complaint by overnight courier to the corporate headquarters of Fluor Daniel, Inc. in Irvine, California. Appendix B, at p. 6a; Appendix K at pp. 50a-51a. The summons and complaint were received at the headquarters of Fluor Daniel, Inc. the next day, September 10, 1996. Appendix B, at p. 6a; Appendix K, at p. 51a. Fluor Daniel is a wholly-owned subsidiary of Fluor Daniel, Inc. Appendix K, at p. 49a.

At the time it was served with Seward's summons and complaint, Fluor Daniel, Inc. had a standard practice in place for receiving process served upon it or one of its subsidiaries and ensuring that all complaints are timely answered. Appendix B, at p. 10a; Appendix K, at pp. 49a-51a. This practice included the requirement that all process served upon Fluor Daniel, Inc. or any of its subsidiaries be forwarded to the headquarters of Fluor Daniel, Inc. in Irvine, California. A paralegal employed at the headquarters is assigned the sole responsibility for receiving service of process and assuring that it is properly routed and assigned to local counsel to ensure that the complaint is timely answered. The standard practice for receiving service of process includes the date-stamping of the documents by a secretary assigned to the paralegal when and as they are received at the headquarters, the routing of the date-stamped documents to the in-house employment attorney's secretary to create a file and prepare a copy of the documents for the attorney, and returning the documents to the paralegal for internal docketing into the company's computer system. If a lawsuit is filed in a state where Fluor Daniel, Inc. or a subsidiary does not have local counsel, the paralegal will make arrangements for the retention of local counsel to represent the defendant in the matter. *See generally* Appendix K, at pp. 49a-51a.[1]

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[1] The standard practice used by Fluor Daniel, Inc. for receiving and monitoring process served upon it and its subsidiaries is set forth in detail in the Affidavit of Erin C. Kantor, which Fluor Daniel submitted and filed in support of its motion to set aside the entry of default and the default judgment. *See generally* Appendix K, at pp. 49a-52a. Ms. Kantor

On the day that the complaint and summons were received at the headquarters of Fluor Daniel, Inc., the entire legal staff attended the funeral for the spouse of a long-time member of the legal department. Appendix K, at p. 51a. The complaint and summons were not discovered until October 17, 1996, some thirty-eight days later, when the paralegal responsible for receiving service of process found the complaint lying on her desk without knowing how it had arrived there. Appendix B, at p. 10a; Appendix K, at p. 51a. The complaint had not been date stamped as it would have been if the standard procedures for receiving process had been followed.[2] Appendix K, at p. 51a. When Seward's complaint was discovered, Fluor Daniel immediately retained local counsel in Wyoming, who made an entry of appearance in the litigation and filed a notice of intent to set aside the default judgment, as well as an answer to the complaint. Appendix B, at pp. 6a-7a. Accordingly, due to clerical or human error which occurred as the result of a chain of events that started with the absence of the entire legal staff from the headquarters of Fluor Daniel, Inc. to attend a funeral on the day that the Seward complaint and summons arrived by courier and that continued throughout September and October of 1996, the legal department of Fluor Daniel

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was the paralegal responsible for receiving process at the headquarters of Fluor Daniel, Inc. at the time service was made of the complaint and summons filed by Seward against Fluor Daniel, a position that she had held for over ten years. Appendix K, at pp. 49a-51a.

[2] According to the affidavit of the paralegal responsible for receiving service of process at the California headquarters of Fluor Daniel, Inc., several other events occurred shortly after the day of the funeral which added to her normal duties during the twenty-day period in which Fluor Daniel was required to answer or otherwise respond to the complaint. First, she spent a substantial amount of time between September 16, 1996 and September 25, 1996, organizing and attending a legal conference that was sponsored by Fluor Daniel, Inc. to provide continuing legal education credits for its in-house counsel located worldwide. Second, she reported for and served on jury duty between September 30, 1996 and October 7, 1996. Finally, the secretary who had the responsibility for date-stamping all service of process received by Fluor Daniel, Inc. during the month of September, 1996, was transferred out of the legal department of Fluor Daniel, Inc. on September 30, 1996. Appendix K, at p. 51a.

was unaware of the filing and existence of the lawsuit by Seward against Fluor Daniel several thousands of miles away in Wyoming for the period of time between September 9, 1996, the date of personal service upon its registered agent, and October 17, 1996, the date it was discovered lying on her desk by the paralegal in charge.

According to Rule 12(a) of the Wyoming Rules of Civil Procedure, Fluor Daniel was required to answer or otherwise plead with respect to Seward's complaint within twenty days after service of process. Rule 12(a), Wyo.R.Civ. P. On October 2, 1996, two days after the deadline for Fluor Daniel to answer the complaint expired, Seward filed a motion for entry of default supported by the affidavit of his attorney, and the Clerk of the Seventh Judicial District Court in and for Natrona County, Wyoming entered an entry of default. Appendix B, at p. 6a; Appendix H, at pp. 25a-26a.

On October 7, 1996, Seward filed a motion for entry of default judgment, praying for judgment in the sum of $562,489.00, which was supported by Seward's affidavit and the affidavit of an accountant. Appendix B, at p. 6a. Seward made no further showing regarding liability and damages. On the same day, the Seventh Judicial District Court in and for Natrona County, Wyoming entered a default judgment in favor of Seward and against Fluor Daniel in the sum of $562,489.00, plus interest at the rate of ten percent (10%) per annum until paid. Appendix B, at p. 6a; Appendix G, at p. 23a-24a.

On October 24, 1996, shortly after Fluor Daniel, Inc.'s paralegal discovered Seward's complaint on her desk, a local Wyoming attorney made an initial entry of appearance in the Seward case on behalf of Fluor Daniel, and on October 25, 1996, filed an answer and a notice of intent to file a motion to vacate the default judgment. Appendix B, at pp. 6a-7a. Substitute counsel made an entry of appearance on behalf of Fluor Daniel in the case on October 28, 1996, and filed a second answer the next day. Appendix B, at p. 7a. On November 5, 1996, Fluor Daniel filed a motion to set

aside the entry of default and the default judgment pursuant to Rules 55(c) and 60(b) of the Wyoming Rules of Civil Procedure. Appendix B, at p. 7a. In its motion, Fluor Daniel argued that its failure to answer or otherwise appear was the result of mistake, inadvertence, and excusable neglect; that the amount of the judgment was entered because of misrepresentations by Seward and his expert witness; and that Fluor Daniel had meritorious defenses to the claims alleged in the complaint. Appendix B, at p. 7a. In a supporting memorandum filed with the district court, Fluor Daniel asserted that Seward was an at-will employee who had voluntarily resigned from his employment, and that the large default judgment was obtained by misrepresentations of fact and was speculative in nature. Appendix B, at p. 7a.

On December 3, 1996, the district court filed a decision letter denying Fluor Daniel's motion to set aside the entry of default and the default judgment. Appendix F, at pp. 21a-22a. A final order based upon the district court's decision letter was entered on December 12, 1996. Appendix E, pp. 19a-20a. Fluor Daniel then filed a timely notice of appeal of the order denying its motion to set aside the entry of default and the default judgment to the Supreme Court of Wyoming.

After the appeal was docketed with the Supreme Court of Wyoming, the Clerk of that Court entered an order assigning the case to the expedited docket, under which the appeal would be heard and disposed of by the Court upon the briefs of the parties without oral argument.[3] Appendix C,

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[3] Pursuant to Rule 8.01(a) of the Wyoming Rules of Appellate Procedure, the Supreme Court of Wyoming, upon docketing of the appeal, will assign a case to either the expedited docket in which the case will be submitted when the time for reply briefs has expired, or the oral argument docket in which the case will not be submitted until the oral argument has been held. Rule 8.01(a), Wyo.R.App.P. The Supreme Court of Wyoming will not hear oral arguments in a case that is assigned to the expedited docket unless the Court, in its discretion, reassigns the case to the oral argument docket upon a showing of good cause by a party filing a motion for reassignment not later than fifteen days after the entry of the order assigning the case to the expedited docket. Rule 8.01(d), Wyo.R.App.P.

at pp. 15a-16a. In an order entered on April 9, 1997, the Court denied a motion that Fluor Daniel had timely filed, pursuant to Rule 8.01(d) of the Wyoming Rules of Appellate Procedure, for reassignment of the appeal to the oral argument docket. Appendix D, at pp. 17a-18a. On April 10, 1998, the Supreme Court of Wyoming issued its decision affirming the order entered by the district court, which denied the motion of Fluor Daniel to set aside the entry of default and the default judgment in favor of Seward and against Fluor Daniel. Appendix B, at p. 14a. *See Fluor Daniel (NPOSR), Inc. v. Seward*, 956 P.2d 1131, 1136 (Wyo. 1998). On April 27, 1998, Fluor Daniel timely filed a petition for a rehearing on the decision of the Supreme Court of Wyoming and a brief in support of the petition.[4] Appendix I, at pp. 27a-29a; Appendix J, at pp. 30a-48a.

In its decision, the Supreme Court of Wyoming, in a case of first impression in Wyoming, established the standard of "excusable neglect" that applies to a motion made under the remedial provisions of Rules 55(c) and 60(b)(1) of the Wyoming Rules of Civil Procedure to set aside an entry of default and a default judgment entered against a corporation that did not have actual knowledge of the filing of the lawsuit or service of process.[5] *Fluor Daniel (NPOSR), Inc. v.*

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[4] According to Rule 9.07 of the Wyoming Rules of Appellate Procedure, an application for a rehearing of a case in the Supreme Court of Wyoming must be by a petition to that court filed within fifteen days after the decision is rendered. *See* Rule 9.07, Wyo.R.App.P. Since the fifteenth day after the decision of the Supreme Court of Wyoming was rendered was a Saturday, the petition and supporting brief were timely filed on April 27, 1998, which was the next day that was not a Saturday or a Sunday. *See* Rule 14.02, Wyo.R.App.P. (governing computation of time for service of pleadings in the Supreme Court of Wyoming).

[5] Prior to the *Fluor Daniel* decision, there were only two cases in Wyoming jurisprudence in which the Supreme Court of Wyoming reviewed the propriety of a default judgment against a corporation for failing to respond to service of process. In the first case, *Midway Oil Corp. v. Guess*, 714 P.2d 339 (Wyo. 1986), the Supreme Court of Wyoming did not apply Rules 55 and 60 of the Wyoming Rules of Civil Procedure, but instead held that an entry of default and a subsequent default judgment filed

Seward, 956 P.2d 1131, 1134-35 (Wyo. 1998); *see also* Appendix B, at pp. 10a-11a. After reviewing the facts, including the evidence that Fluor Daniel had presented in the district court regarding the standard practice for receiving and responding to service of process, the Supreme Court of Wyoming held that the district court "could view the unexplained failure of Fluor Daniel's business practice with respect to service of process as careless and within Fluor Daniel's control, and its finding does not constitute an abuse of discretion." *Id.* at 1134-35; *see also* Appendix B, at pp. 10a-11a.

In its holding, the Supreme Court of Wyoming treated the circumstances under which Fluor Daniel failed to timely appear and respond to Seward's complaint with the same disdain as a defendant who had *actual knowledge* of service of process but, for whatever reason, intentionally or recklessly failed to appear. In this respect, the Court relied on several cases holding that a default judgment should not be set aside where the defendant has knowingly or intentionally failed to respond to process as support for its ruling that the

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prior to the expiration of the answer date, and without notice to the corporation of the existence of the litigation, eliminated any discretion in the trial court other than to set aside the default judgment upon the seasonable filing of a motion to do so. *Id.* at 345.

The second case, *U.S. Aviation, Inc. v. Wyoming Avionics*, 664 P.2d 121 (Wyo. 1983), is factually dissimilar to the *Fluor Daniel* case. In that case, service of process was made upon the Wyoming Secretary of State due to the failure of the defendant corporation to maintain a registered agent for service of process in Wyoming. *Id.* at 124. The Supreme Court of Wyoming, in affirming the trial court's decision that the defendant had not established a sufficient ground under Rule 60(b)(1) of the Wyoming Rules of Civil Procedure to set aside the resulting default judgment, correctly held that the defendant's behavior was inappropriate under the circumstances, including, among other things, its failure to maintain a registered agent, and that relief based upon mistake, inadvertence, surprise, or excusable neglect was not appropriate despite the corporation's lack of actual notice of service of process. *Id.* at 126. That case, however, is not applicable here as Fluor Daniel had an authorized agent who received process, and was a foreign corporation in good standing in Wyoming at the time the default judgment was entered. Therefore, none of the circumstances present in *U.S. Aviation* are present in this case.

district court had not abused its discretion in finding that the neglect of Fluor Daniel was not excusable, *citing Whitney v. McDonough*, 892 P.2d 791, 794 (Wyo. 1995) (dilatory conduct in obtaining legal counsel is not sufficient ground for setting aside default judgment); *Vanasse v. Ramsay*, 847 P.2d 993, 998 (ongoing settlement negotiations commenced prior to filing of lawsuit is insufficient as excusable neglect); *Matter of Injury to Seevers*, 720 P.2d 899, 903 (Wyo. 1986) (deliberate decision to not retain counsel for nearly two months is not such excusable neglect as would justify relief); and *Booth v. Magee Carpet Co.*, 598 P.2d 1252, 1254 (Wyo. 1976) (failure to employ attorney until 53 days after service of process does not constitute excusable neglect). *Fluor Daniel*, 956 P.2d at 1135; *see also* Appendix B, at p. 11a. The common thread in each of the cited cases that the Supreme Court of Wyoming relied upon to support its holding is that the defendant knew of the litigation and knew of his duty to respond, but failed to ensure a proper response was timely filed.

The uncontested record before the Supreme Court of Wyoming demonstrated that Fluor Daniel had never received notice of the filing of the Seward complaint at the time the entry of default and the default judgment were entered -- despite Fluor Daniel's utilization of reasonable procedures to avoid such a default. The Supreme Court of Wyoming nevertheless concluded that it did not discern any evidence in the record before it that would qualitatively distinguish Fluor Daniel's neglect from the styles of neglect referred to in the cited cases. The Court, however, expressly commented in a footnote to its holding that the federal standard for determining the styles of neglect that would be found to be "excusable" is more liberal than that applied by the Court, stating:

> In 1993 the Supreme Court of the United States made the concept of "excusable neglect" under the federal rules substantially more liberal. *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507

> U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (U.S.Tenn. 1993). We elect to continue to follow our Wyoming rule.

Fluor Daniel, 956 P.2d at 1135, n.1; *see also* Appendix B, at p. 11a.

In its petition for rehearing and the brief in support of its petition for rehearing, Fluor Daniel argued, *inter alia*, that the Supreme Court of Wyoming should grant a rehearing on its decision because of its failure to address Due Process and public policy considerations in its original decision. In particular, Fluor Daniel argued that in establishing the standard for determining whether Fluor Daniel had demonstrated the existence of excusable neglect under Rule 60(b)(1) of the Wyoming Rules of Civil Procedure, the Court had relied upon precedent which only involved defendants who had actual knowledge of the service of process but failed to appear and answer the complaint. Fluor Daniel further argued that this matter involved a case of first impression in Wyoming because its paralegals and in-house attorneys did not have "actual" knowledge of service of the Seward complaint, and that *a fortiori* the standard applied by the Court in its decision denied Fluor Daniel an opportunity to exercise its due process rights under the United States Constitution. Appendix I, at pp. 27a-28a; Appendix J, at pp. 39a-47a.

The Constitutional due process issue raised by Fluor Daniel in its petition for rehearing and the brief in support of its petition were timely raised. First, Fluor Daniel clearly objected to the entry of default and the default judgment as a matter of fairness in its pleadings to the district court and on appeal to the Supreme Court of Wyoming. *See Fluor Daniel*, 956 P.2d at 1132-33; Appendix B, at pp. 4a-7a. Second, Rules 55(c) and 60(b) of the Wyoming Rules of Civil Procedure specifically required Fluor Daniel to move to set aside the entry of default and the default judgment based upon the standards set forth in the rules before any constitutional objection would be ripe for adjudication. Third, since this case is one of first impression in Wyoming, Fluor Daniel had no

reason to suspect that the Supreme Court of Wyoming would apply an unconstitutional standard of review of the district court's discretion in refusing to set aside the entry of default and the default judgment. Finally, it is clear that where a federal constitutional claim under the Fourteenth Amendment is first raised on rehearing, this Court may properly exercise jurisdiction. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 83, 108 S. Ct. 896, 99 L.Ed.2d 75 (1988) (stating that "[a]ppellant's motion for rehearing for the first time asserted federal constitutional claims under the Fourteenth Amendment.").[6]

On June 18, 1998, the Seventh Judicial District Court in and for Natrona County, Wyoming entered an order continuing the stay of the execution and enforcement of the default judgment against Fluor Daniel pending the outcome of Fluor Daniel's filing of this Petition for a Writ of Certiorari with this Court and conditioned on the district court's acceptance and approval of a substitute supersedeas bond in the sum of $700,000.00. Appendix L, at pp. 53a-57a. The substituted supersedeas bond was filed with, and approved by, the district court on the same day. Appendix M, at pp. 58a-65a.

REASONS FOR GRANTING THE WRIT

IN DENYING THE PETITION OF FLUOR DANIEL FOR A REHEARING ON ITS DECISION IN *FLUOR DANIEL (NPOSR), INC. V. SEWARD*, 956 P.2d 1131 (WYO. 1998), THE SUPREME COURT OF WYOMING DENIED FLUOR DANIEL ITS RIGHT TO HAVE THE ORDER OF THE DISTRICT COURT DENYING ITS MOTION TO SET ASIDE THE ENTRY OF DEFAULT AND THE DEFAULT JUDGMENT REVIEWED IN A MEANINGFUL MANNER AS

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[6] In Wyoming, a petition for rehearing may be granted on a constitutional issue not raised below or in the original appeal if the public interest is involved. *Madden v. Wild, State Examiner*, 48 Wyo. 372, 377-78, 49 P.2d 637 (1935); *see generally Steffey v. City of Casper*, 358 P.2d 951 (Wyo. 1961).

REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision of the Supreme Court of Wyoming in *Fluor Daniel (NPOSR), Inc. v. Seward, supra*, essentially creates a judicial lottery,[7] whereby any plaintiff need merely file a complaint in order to enter, and if after technically complying with the rules of service of process, a defendant fails to answer, for whatever reason, the plaintiff wins. The amount of the plaintiff's prize, upon entry of default, is limited only by the unchallenged "creativity" of the plaintiff and its counsel in dreaming up a wish list of damages because, under the rules permitted by the opinion of the Supreme Court of Wyoming in this case, a defendant's due process rights are wholly irrelevant in the court below, and in the standard of nonreview adopted by the opinion, by the highest court of Wyoming as well.

Under the opinion of the Supreme Court of Wyoming, a corporate defendant that, as demonstrated by the undisputed facts, never learned of the commencement of the action below -- despite its use of reasonable procedures to avoid such a result -- was denied any opportunity to present a defense to a claim (whether it has merit or not), let alone be heard on the right of damages it must pay, simply because it never receives actual notice of the filing of a lawsuit thousands of miles away. Such a ruling flies in the face of any reasonable notion of due process, and the opinion of the Supreme Court of Wyoming creating such a lottery should,

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[7] The notion of the judicial lottery arises out of the prophetic dissent that Mr. Justice Taylor of the Supreme Court of Wyoming wrote some three years ago in *Whitney v. McDonough*, 892 P.2d 791 (Wyo. 1995), a decision in which the majority of the Court held that in the circumstances of that case, the defendant did not prove that his dilatory conduct in obtaining legal counsel constituted excusable neglect. In his dissent, Mr. Justice Taylor made the following apt statement: "Surely Chester McDonough must feel as though he just won the lottery. Just as surely, Cory Whitney is wishing he had sent his entry in on time." *Id.* at 795 (dissent, Taylor J.).

and it is respectfully submitted must, be reviewed by this Court by the grant of this Petition for a Writ of Certiorari.

A. Due Process is Fundamental to Fairness and Justice.

The cornerstone of our judicial system is the notion of due process under the law whereby each litigant has the right to a meaningful opportunity to be heard and to present evidence before any decision is entitled to the dignity of finality. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 94 L.Ed. 865 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971); *Peralta*, 485 U.S. at 84. This constitutional right is granted and guaranteed by the Constitution of the United States and should not be discarded lightly. *Boddie*, 401 U.S. at 379; *Peralta*, 485 U.S. at 86-87. As stated by this Court:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane, 339 U.S. at 313. This right to due process, which is guaranteed by the Fourteenth Amendment to the Constitution of the United States, is the result of a balance between the interests of the state and the individual interests sought to be protected.

Due process begins with the elementary and fundamental requirement that in any proceeding which is to be accorded finality, notice reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action must be provided, and that some notice must

afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L.Ed. 278 (1940); *Mullane*, 339 U.S. at 314. In addition to the requirement of notice, this Court has recognized that when notice is a person's due, process that is a mere gesture is not due process. *Mullane*, 339 U.S. at 315.

The essential guarantee of the Due Process Clause is that of fairness. Any procedure that may deprive an individual or person of property must be fundamentally fair in the resolution of the factual and legal basis for the government actions at hand. While different situations may entail different types of procedures, there is always the general requirement that the government process be fair and impartial. A fair trial in a fair tribunal is a basic requirement of due process. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L.Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942 (1955).

To determine the type of procedures that are required by due process when a governmental action would deprive an individual of a property interest, the court must assess factors that include the importance of the property interest at stake and the extent to which the requested procedure may reduce the possibility of erroneous decision-making. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). On the other side of the balance, the court must assess the governmental interest in avoiding the increased administrative and physical burdens that result from increased procedural requirements.

The resolution of whether or not due process has been provided requires a balance of factors. First, the private interests that would be affected by the official action must be considered. *Mathews v. Eldridge*, 424 U.S. at 335. Second, the risk of erroneous deprivation of interests through the procedures used and the probative value, if any, of additional or substitute procedural safeguards must be considered. *Id.* Finally, the government's interest, including the function involved in the physical and administrative bur-

dens that any additional or substitute procedural requirement would entail, must be considered. *Id.*

In this case, Fluor Daniel has an obvious interest in having its motion to set aside the entry of default and the default judgment reviewed for excusable neglect for the obvious reason that if the judgment is set aside, it would be judicially relieved of the obligation to pay a judgment in the sum of $562,489.00 that was entered without its actual knowledge. The risk of erroneous deprivation and the loss of property is extremely high under the Wyoming rules established for the review of an entry of default and of a default judgment. Default judgments like the one entered against Fluor Daniel are entered without any type of a hearing. Moreover, the Supreme Court of Wyoming has stated that, "[t]he policy of providing finality through deterrence to late filing litigants is achieved by Rules 55 and 60." *Vanasse*, 847 P.2d at 1000. Although the need for deterrence and finality is a state interest, it should not outweigh the need and preference for litigation on the merits where the default is entered following a defendant's excusable neglect and lack of actual knowledge.

The standard adopted by the Supreme Court of Wyoming is essentially a standard of no tolerance for a corporate defendant's failure to answer a summons and complaint regardless of the fact that it has in place standardized procedures designed to prevent such occurrence, and it had no actual knowledge of the suit due to one isolated and very rare human error.[8] Clearly, the government's interest is in expeditious litigation that may be accorded finality. However, an interest in finality should not trump an individual's right to litigation on the merits where the failure to respond to service of process is due to excusable neglect. *See* Rule 60(b)(1) Fed.R.Civ.P.; Rule 60(b)(1) Wyo.R.Civ.P.

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[8] To the knowledge of the paralegal who is responsible for receiving service of process at the headquarters of Fluor Daniel, Inc., neither Fluor Daniel, Inc. nor any of its subsidiaries had ever failed to answer a properly served complaint during her ten years of working in the legal department. Appendix K, at p. 50a.

B. Due Process Requires that Where a Defendant Has No Actual Knowledge of Service of Process, a Motion to Set Aside the Default Judgment Must be Reviewed in a Meaningful Manner, and Excusable Neglect Includes Something More than Omissions Caused by Circumstances Beyond the Control of the Party Seeking Relief.

Default judgments deprive individuals of their property interest without an opportunity to be heard. Because the entry of a default judgment is such a drastic measure, due process and the decisions of federal and state courts recognize that default judgments are not favored and judgments entered after litigation on the merits are preferred. *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L.Ed. 266 (1949); *Davis v. Musler*, 713 F.2d 907, 912-13 (2nd Cir. 1983); *Feliciano v. Reliant Tooling Company, Ltd.*, 691 F.2d 653, 656 (3rd Cir. 1982); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation*, 843 F.2d 808, 810-11 (4th Cir. 1988) (stating that, "where default judgments are at issue, over the years this court has taken an increasingly liberal view of Rule 60(b)"); *Harrell v. DCS Equipment Leasing Corporation*, 951 F.2d 1453, 1459 (5th Cir. 1992); *United Coin Meter Company, Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839, 846 (6th Cir. 1983) (stating that, "a 'glaring abuse' of discretion is not required for reversal of a court's refusal to relieve a party of the harsh sanction of default"); *see also Gregorian v. Izvestia*, 871 F.2d 1515, 1526 (9th Cir. 1989) (extraordinary circumstances need not be shown to obtain relief from default judgment under Federal Rule of Civil Procedure 60(b)(6)).

This proposition has also been recognized repeatedly by the Wyoming Supreme Court over the years. *Lake v. Lake*, 63 Wyo. 375, 400, 182 P.2d 824 (1947); *Westring v. Cheyenne National Bank*, 393 P.2d 119, 122 (Wyo. 1964); *Mora v. Husky Oil Company*, 611 P.2d 842, 849 (Wyo. 1980); *Gifford v. Casper Neon Sign Co., Inc.*, 639 P.2d 1385, 1389 (Wyo. 1982); *Midway Oil Corp. v. Guess*, 714 P.2d 339, 347 (Wyo. 1986); *Claassen v. Nord*, 756 P.2d 189, 193

(Wyo. 1988); *Spitzer v. Spitzer*, 777 P.2d 587, 591 (Wyo. 1989); *Carlson v. Carlson*, 836 P.2d 297, 301 (Wyo. 1992); *McGarvin-Moberly Construction Company v. Welden*, 897 P.2d 1310, 1314 (Wyo. 1995).

Before an opportunity to be heard on the merits under due process of law is terminated by a default judgment, the facts that no actual notice was received by the defendant in default and that there was no willing failure to respond to service of process must be considered. Petitioner recognizes that default judgments do not *per se* violate the due process guarantees found in the Fourteenth Amendment to the Constitution of the United States. *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876). This Court, however, has stated that while a default may be proper when a defendant, after adequate notice, chooses not to appear and exercise his right to be heard, "the denial of the right to appear and be heard at all is a different matter altogether." *Windsor*, 93 U.S. at 278. As noted by this Court over a century ago in *Windsor*, the guarantee of a right to appear and be heard must be adequate and something more than a gesture. *Id.*; *see also Mullane*, 339 U.S. at 315. Although Fluor Daniel was accorded the right of review of the entry of default and the default judgment on the ground of excusable neglect embodied in Rules 55(c) and 60(b) of the Wyoming Rules of Civil Procedure, the standard of "excusable neglect" established by the Supreme Court of Wyoming is so strict that Fluor Daniel was effectively denied meaningful review of the district court order denying its motion to set aside the entry of default and the default judgment.

In this case, the Supreme Court of Wyoming's application of the rules providing for review of default judgments was nothing more than a mere gesture and a *pro forma* affirmance of the district court's decision refusing to set aside the default judgment, as no more than perfunctory consideration was given to the circumstances surrounding the conduct that lead to the entry of default and the default judg-

ment.[9] This application of such a strict rule is of constitutional significance. There exist infinite possibilities for other defendants to have default judgments entered against them, even though they would have ordinarily consented to jurisdiction in order to plead or otherwise defend against the cause of action had they received actual notice of the summons and complaint.

In this case, the procedural remedies available to Fluor Daniel do not satisfy the due process requirements guaranteed by the Fourteenth Amendment to the Constitution of the United States. Rule 60(b)(1) of the Wyoming Rules of Civil Procedure provides Fluor Daniel the opportunity to have the default judgment set aside where it was entered due to excusable neglect. This is a substantive right that must be protected by due process of law. The standard of excusable neglect established by Supreme Court of Wyoming in its decision does not give effect to the remedial purpose of Rule 60(b) intended by the draftsmen of the Wyoming Rules of Civil Procedure, which are clearly patterned after the Federal Rules of Civil Procedure.[10]

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[9] Because the Supreme Court of Wyoming found that Fluor Daniel had not articulated a ground for relief under Rule 60(b)(1) of the Wyoming Rules of Civil Procedure for excusable neglect, it did not consider the other factors involved in a determination of whether or not an entry of default or a default judgment should be set aside. *Fluor Daniel*, 956 P.2d at 1135; *see also* Appendix B, at p. 11a. These other factors include whether or not the defendant has demonstrated a meritorious defense, whether culpable conduct on the part of the defendant resulted in the default, and whether or not the plaintiff would be prejudiced as a result of setting aside the entry of default and the default judgment. Although the Court did not resolve whether or not Fluor Daniel had satisfied the three other factors (other than holding that the conduct of Fluor Daniel was culpable based solely on the district court's concomitant finding that the neglect of Fluor Daniel was not excusable), Fluor Daniel argued in the brief in support of its petition for rehearing that it had met each of these factors, and that once a finding of excusable neglect is made, it would be able to satisfy the other three factors such that the default judgment should have been set aside in the discretion of the district court.

[10] The Supreme Court of Wyoming has repeatedly recognized that the Wyoming Rules of Civil Procedure are patterned and modeled after the Federal Rules of Civil Procedure, and that interpretations of the

Under Rule 60(b) of the Wyoming Rules of Civil Procedure, a defendant may have a default judgment reviewed on enumerated grounds by motion to the court. As a matter of public policy, this review must be more than a *pro forma* denial of motions to set aside entries of default and default judgments. This is especially true where there is no actual knowledge of service of process by the defendant. In this case, much like in *Klapprott v. United States, supra*, Fluor Daniel was effectively unable to plead or otherwise defend because it received no actual notice of the complaint and summons which were served on its registered agent.[11] Fluor Daniel did not intentionally default on its obligation to plead or otherwise defend.

In its own opinion, the Supreme Court of Wyoming acknowledged that the federal standard for determining what types of neglect will be considered "excusable" is more liberal than the Wyoming standard, despite its prior policy statements that default judgments are disfavored in preference of trials on the merits. *See Fluor Daniel*, 596 P.2d at 1135, *citing Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993). The Wyoming standard is decidedly different than the standard which is applied by most federal courts under the same procedural rules. *See, e.g., Kinnear Corporation v. Crawford Door Sales Company*, 49 F.R.D.3, 7 (D. S.C. 1970); *Wagstaf-El v.*

Federal Rules of Civil Procedure are to be given weight when the Wyoming Supreme Court attempts to interpret its own rules of civil procedure. *Glover v. Giraldo*, 824 P.2d 552, 556 (Wyo. 1992); *Lane Company v. Busch Development, Inc.*, 662 P.2d 419, 423 (Wyo. 1983); *Whitefoot v. Hanover Insurance Company*, 561 P.2d 717, 720 (Wyo. 1977).

[11] In *Klapprott*, the defendant against whom the default judgment was entered was served with process and failed to answer the complaint within the appropriate time frame. *Klapprott*, 335 U.S. at 603. However, before the expiration of the answer period and after the defendant had been served, the petitioner had been arrested and confined in jail on criminal charges, and as a consequence was unable to answer the complaint timely. *Id.* This decision was based upon Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Carlton Press Company, 913 F.2d 56, 57 (2nd Cir. 1990) (default judgment may be set aside, even where failure to answer is willful, upon showing of meritorious defense).

In *Pioneer*, this Court did establish a more liberal standard for determining the existence of excusable neglect under the federal rules. In reviewing that term, as used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, this Court stated "excusable neglect" is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant who was seeking relief from the otherwise preclusive effect of the Federal Rules of Bankruptcy Procedure. *Pioneer*, 507 U.S. at 392. As noted by this Court in *Pioneer*, Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure was plainly contemplated by Congress to allow courts to permit, where appropriate, late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. In noting that Rule 9006(b) was patterned after Rule 6(b) of the Federal Rules of Civil Procedure, this Court observed that "excusable neglect", as applied under Rule 6(b), has been extended to inadvertent delays and is not limited merely to circumstances beyond the control of the movant. *Id.*, 507 U.S. at 391-92, n. 7.

Although *Pioneer* involved the interpretation and application of the term "excusable neglect" in the context of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, this Court analyzed that term as it is used in a variety of federal rules, including Rule 60(b)(1) of the Federal Rules of Civil Procedure. In that respect, this Court said that for purposes of Rule 60(b), the term "excusable neglect" encompasses circumstances in which the failure to comply with a filing deadline is attributable to negligence, unlike the so-called "Wyoming rule" which does not appear to make any allowance for negligence or fault. *Id.*, 507 U.S. at 394. The notion that neglect encompasses negligence and carelessness established in *Pioneer*, has been applied to rule 60(b)(1) by other federal courts. *Canfield v. Van Atta Buick/*

GMC Truck, Inc., 127 F.3d 248, 249-250 (2d Cir. 1997), *cert. denied.* ____ U.S. ____, 118 S. Ct. 1055, 140 L.Ed.2d 117 (1998); *see also United We Stand America, Inc. v. United We Stand, America New York.*, 128 F.3d 86, 89 (2nd Cir. 1997).

While it is the opinion of at least one circuit, which indicates a split in the interpretation of *Pioneer*, that late filings may continue to be held inexcusable, *Canfield*, 127 F.3d at 251, most of the circuits acknowledge that *Pioneer* has provided a more liberal definition of what constitutes excusable neglect. *United States v. T. J. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996); *Thompson v. E.I. Du Pont de Nemours & Co., Incorporated*, 76 F.3d 530, 533 (4th Cir. 1996); *Cheney v. Anchor Glass Container Corporation*, 71 F.3d 848, 849-50 (11th Cir. 1996); *Chemetron Corp. v. Jones*, 72 F.3d 341, 349 (3rd Cir. 1995); *Fink v. Union Central Life Insurance Company*, 65 F.3d 722, 724 (8th Cir. 1995); *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995); *Virella-Nieves v. Briggs & Stratton Corporation*, 53 F.3d 451, 454 (1st Cir. 1995); *United States v. Clark*, 51 F.3d 42, 43-44 (5th Cir. 1995); *City of Chanute, Kansas v. Williams Natural Gas Company*, 31 F.3d 1041, 1045-46 (10th Cir. 1994); *United States v. Hooper*, 9 F.3d 257, 258-59 (2nd Cir. 1993); *Information Systems and Networks Corporation v. United States*, 994 F.2d 792, 796 (Fed. Cir. 1993). In addition, two circuits have held it to be an abuse of discretion not to grant relief for missed deadlines based upon the fault of counsel. *Cheney*, 71 F.3d at 849-50; *Information Systems*, 994 F.2d at 796. Thus, the decisions prior to *Pioneer* holding that institutional mistakes did not constitute excusable neglect on a *per se* basis no longer may be given weight. *See, e.g. Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987); *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1976).

As noted by this Court in its *Pioneer* decision, prior to *Pioneer* there had been a split in the circuit courts of appeals with respect to the proper standard to be applied for determining whether or not a default judgment should be set aside as a result of excusable neglect. In 1993, the Su-

preme Court of Wyoming specifically noted its acceptance of the view held by the Seventh and Tenth Circuit Courts of Appeals favoring default judgments. *Vanasse*, 847 P.2d at 1000. In *Vanasse*, the Supreme Court of Wyoming observed that the traditional policy disfavoring default judgments as a harsh sanction, was changing in order to favor default judgments as a common sanction for late filing defendants. *Id.*, *citing*, *Matter of State Exchange Financial Company*, 896 F.2d 1104, 1106 (7th Cir. 1990). The Wyoming Supreme Court's reliance upon these opinions, however, is misplaced in light of this Court's decision in *Pioneer*.

The decision of the Supreme Court of Wyoming in this case clearly does not adopt the standard for excusable neglect set forth in *Pioneer*. Thus, for purposes of due process, the so-called "Wyoming rule" weighs finality of litigation to the detriment of litigation on the merits. Although state courts are generally given authority to prescribe and enforce their own procedural rules, such authority cannot be exercised at the expense of due process or other constitutionally guaranteed rights. *Heller v. Doe*, 509 U.S. 312, 332, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993); *Northeast Savings, F.A. v. Hintlian*, 696 A.2d 315, 317 (Conn. 1997).

The standard of excusable neglect established in *Pioneer* should be applied in this case. First, it is consistent with the intent of the Federal Rules of Civil Procedure after which the Wyoming rules are modeled. Second, it more accurately reflects the notion that litigation should be decided on the merits. Finally, as a matter of due process and public policy, timely motions to set aside an entry of default and a default judgment do not consume large amounts of time. Moreover, where a default judgment is entered against a defendant with no "actual" notice of service of process, a motion to set aside the default judgment is the only potential for due process such a defendant will receive.

A default judgment is indeed a drastic remedy, and it forecloses a party's ability to dispute both liability and damages on the merits of any plaintiff's cause of action. Absent

a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie*, 401 U.S. at 377. Fluor Daniel was denied its right to a hearing in this case because of its failure to file an answer to Seward's complaint within the time period required under Rule 12(a) of the Wyoming Rules of Civil Procedure. These same rules, however, provide a mechanism to set aside the resulting entry of default and default judgment, and the Supreme Court of Wyoming's failure to enforce such mechanism in its review of the district court's decision is contrary to public policy and due process, especially where earnest efforts were made to respond to the entry of default and the default judgment as soon as notice of its entry was received by Fluor Daniel.

The stringent standard for proving excusable neglect employed by the Supreme Court of Wyoming in its opinion is tantamount to a judicial abrogation of the rights afforded to each litigant in Wyoming pursuant to Rules 55(c) and 60(b) of the Wyoming Rules of Civil Procedure. The application of this strict standard is entirely *pro forma*, not elastic, and leaves no room for human error. As a consequence, it does not provide anything more than a gesture of the due process required to give effect to the remedial purposes of Rules 55(c) and 60(b). *See Mullane*, 339 U.S. at 315. Under the holding of the Supreme Court of Wyoming, no matter how detailed and elaborate a system is established for receiving and responding to service of process, one single error, for which a human being is accountable and which will undoubtedly occur from time to time, *ipso facto*, will lead to a default judgment in the amount set forth in any affidavit that may be submitted by the plaintiff. Such a result does not give effect to the remedial purposes of Rules 55(c) and 60(b) of the Wyoming Rules of Civil Procedure, or of the same rules of the Federal Rules of Civil Procedure upon which the Wyoming rules are patterned and modeled, as discussed in this Court's decision in *Pioneer*.

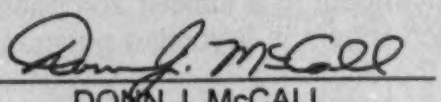
The standard applied by the Supreme Court of Wyoming is in direct conflict with the standard of excusable ne-

glect set forth by this Court and the federal circuit courts of appeal, and as a result, Fluor Daniel respectfully requests that its petition for a writ of certiorari be granted so that this most significant issue of constitutional law may be decided by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner, Fluor Daniel (NPOSR), Inc., respectfully requests that a Writ of Certiorari issue to review the decisions of the Supreme Court of Wyoming below.

Respectfully submitted,

By: 

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APPENDIX A -- ORDER OF THE SUPREME COURT OF WYOMING DENYING PETITION FOR REHEARING ENTERED MAY 5, 1998

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1998

		In The Supreme Court State of Wyoming Filed May -5 1998 Judy Pacheco, Clerk s/ Carol Thompson by Deputy
FLUOR DANIEL (NPOSR), INC., a Delaware corporation, Appellant (Defendant),	)	
v.	)	No. 97-18
DAVID G. SEWARD, Appellee (Plaintiff).	)	

ORDER DENYING PETITION FOR REHEARING

Appellant, Fluor Daniel (NPOSR), Inc., having filed with this Court its Petition for Rehearing together with Brief of Appellant in Support of Petition for Rehearing, and the Court having reviewed the file and record of the Court, it is

ORDERED that Appellant's Petition for Rehearing be and it hereby is denied.

DATED this 5th day of May, 1998.

FOR THE COURT:
s/ William A. Taylor
WILLIAM A. TAYLOR
CHIEF JUSTICE

APPENDIX B -- OPINION OF THE SUPREME COURT OF WYOMING FILED APRIL 10, 1998

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1998

April 10, 1998

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,	)	
Appellant (Defendant),	)	
v.	)	No. 97-18
DAVID G. SEWARD,	)	
Appellee (Plaintiff).	)	

Appeal from the District Court of Natrona County:
The Honorable Dan Spangler, Judge

Representing Appellant:
Bruce N. Willoughby & Donn J. McCall of Brown, Drew, Massey & Sullivan, Casper, Wyoming.

Representing Appellee:
Mark W. Gifford of Gifford & Bonner, Casper, Wyoming.

Before **TAYLOR, C.J.**, and **THOMAS, MACY, GOLDEN,** and **LEHMAN, JJ.**

NOTICE: This opinion is subject to formal revision before publication in the Pacific Reporter Second. Readers are requested to notify the Clerk of the Supreme Court, Supreme Court Building, Cheyenne, Wyoming 82002, of any typographical or other formal errors, in order that corrections may be made before final publication in the permanent volume.

THOMAS, Justice.

The critical question presented in this case is whether the mysterious disappearance of suit documents within a corporate headquarters constitutes "mistake, inadvertence, surprise, or excusable neglect" that results in an abuse of discretion by a trial court in finding culpable conduct on the part of the defendant and refusing to set aside an entry of default and a default judgment. Collateral issues are presented with respect to fraudulent misrepresentations concerning damages and public policy considerations justifying a conclusion of abuse of discretion. David G. Seward (Seward) filed this action, claiming wrongful termination in breach of his employment contract and seeking lost wages, lost employment benefits, court costs, attorney fees and other relief deemed to be just and proper. Fluor Daniel (NPOSR), Inc. (Fluor Daniel) failed to answer the Complaint within the time permitted by the Wyoming Rules of Civil Procedure, and Seward sought and obtained an Entry of Default and a Default Judgment in the amount of $562,489.00. When Fluor Daniel sought by motion to have the Default Judgment and the Entry of Default set aside, the trial court ruled that culpable conduct by Fluor Daniel led to the Entry of Default and the Default Judgment; the neglect claimed by Fluor Daniel was not excusable; Fluor Daniel had not established fraud, misrepresentation or other misconduct by Seward that would justify relief under WYO. R. CIV. P. 60(b)(3); and neither the Default Judgment nor the Entry of Default should be set

aside. We hold that the trial court did not commit an abuse of discretion with respect to its ruling, and the judgment in favor of Seward is affirmed.

In the Appellant's Brief, Fluor Daniel articulates the issues to be considered in this way:

> 1. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant where appellee had fraudulently misrepresented the amount of damages to which he was allegedly entitled.
>
> 2. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant as required by public policy.
>
> 3. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant where its failure to timely answer the complaint was the result of excusable neglect.

In the Brief of Appellee, filed by Seward, only one issue is set forth:

> Did the district court abuse its discretion in refusing to set aside the entry of default and default judgment?

No additional issues were stated in the Appellant's Reply Brief, filed by Fluor Daniel.

On September 6,1996, Seward commenced an action against Fluor Daniel by filing a Complaint in which he

alleged wrongful termination of an employment contract by Fluor Daniel in May of 1996. He alleged that he had suffered damage in the form of lost wages and lost employment benefits because of the breach of the employment contract, and he sought relief in the form of special damages "representing the amount of compensation and benefits" which he would be entitled to under his contract of employment; costs of the action and reasonable attorney's fees; and "such other and further relief as the Court deems just and proper." Personal service was made upon Fluor Daniel on September 9, 1996, by serving its registered agent for process in Cheyenne pursuant to Wyo. R. Civ. P. 4(d)(4). The Summons and Complaint were forwarded by the agent for process to Fluor Daniel's headquarters in Irvine, California on the same day by Federal Express. The agent for service of process determined that the Summons and Complaint were received at Fluor Daniel's headquarters the following day, September 10, 1996.

The twenty days for Fluor Daniel to answer or otherwise plead with respect to Seward's Complaint, pursuant to WYO. R. CIV. P. 12(a), expired on September 30, 1996, and no responsive pleading was filed. On October 2, 1996, Seward filed a Motion for Entry of Default supported by the affidavit of his attorney, and the clerk of the district court, having found that Fluor Daniel had failed to answer or otherwise respond to the complaint within the required time, entered an Entry of Default. On October 7, 1996, Seward filed a Motion for Entry of Default Judgment, praying for judgment in the sum of $562,489.00, which motion was supported by Seward's affidavit and the affidavit of a certified public accountant. On the same day, Default Judgment was entered in favor of Seward and against Fluor Daniel in the sum of $562,489.00 with interest at the legal rate until paid.

An initial Entry of Appearance was made for Fluor Daniel on October 24, 1996, and on October 25, 1996, a Notice of Intent to File Motion to Vacate Default Judgment was filed as well as an Answer. On October 28, 1996, a Motion to Withdraw As Counsel of Record was filed by the

initial attorney, and an Entry of Appearance was filed by another attorney. On October 29, 1996, a second answer was filed. Then on November 5, 1996, the Defendant's Motion to Set Aside Entry of Default and Default Judgment Pursuant to Wyoming Rules of Civil Procedure 55(c) and 60(b) was filed. In that motion, Fluor Daniel contended that its failure to answer or otherwise appear was the result of mistake, inadvertence and excusable neglect; the amount of the judgment was entered because of misrepresentations by the plaintiff and the plaintiff's expert witness; and that Fluor Daniel had meritorious defenses to the claims contained in the Complaint. In a memorandum filed in support of the motion to set aside default judgment and entry of default, Fluor Daniel asserted that Seward was an at-will employee who had voluntarily resigned from his employment. Fluor Daniel also contended that the large default judgment was obtained by misrepresentations of fact and was speculative in nature.

A hearing on [Fluor Daniel's] Motion to Set Aside Entry of Default and Default Judgment Pursuant to Wyoming Rules of Civil Procedure 55(c) and 60(b) was held on November 25, 1996, and in a decision letter filed on December 3, 1996, the motion was denied. The Order that was entered by the court on December 12, 1996, contained these specific findings:

> 1. Culpable conduct by the Defendant led to the entry of default and default judgment. Considering the inexcusable neglect of Defendant in this instance, relief cannot be granted under Rule 60(b)(1) or (6).
>
> 2. Defendant has not met its burden of proving fraud, misrepresentation or other misconduct by Plaintiff which would entitle Defendant to relief under Rule 60(b)(3).

Fluor Daniel appealed from the Order denying its motion.

The procedure relating to judgment by default is set forth in WYO. R. CIV. P. 55, and the grounds for setting aside the default and the default judgment are articulated in WYO. R. CIV. P. 55(c), which provides:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

The grounds for relief from a final judgment as set forth in WYO. R. CIV. P. 60(b), alluded to in WYO. R. CIV. P. 55(c), are:

> (b) *Other reasons.* -- On motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *

Good cause for setting aside an entry of default, pursuant to WYO. R. CIV. P. 55(c), is to be found in the justifications for relief from a final judgment articulated in WYO. R. CIV. P. 60(b). *Vanasse v. Ramsay*, 847 P.2d 993, 995 (Wyo. 1993).

Decisions resolving motions for setting aside the entry of default or a default judgment are made in the exercise of sound discretion by the trial court. *Lee v. Sage Creek Refining Co.*, 947 P.2d 791, 793 (Wyo. 1997); *Whitney v. McDonough*, 892 P.2d 791, 794 (Wyo. 1995); *Vanasse*, 847 P.2d at 996; *Claassen v. Nord*, 756 P.2d 189, 193 (Wyo. 1988). The discretion that is invoked is defined in *Martin v. State*, 720 P.2d 894, 897 (Wyo. 1986):

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

The analytical process to be invoked by the trial court in the exercise of its discretion is summarized in *Whitney*, 892 P.2d at 794. The court first must consider whether the filed motion articulates a reason for relief under WYO. R. CIV. P. 60, and that is a question of law to be reviewed for correctness. In this instance, the district court recognized the adequate articulation of reasons for relief under WYO. R. CIV. P. 60. When an appropriate reason is set forth, the exercise of discretion in granting or denying relief depends upon the facts of the case. In making that decision, the trial court is to consider whether the moving party established the articulated grounds for relief and demonstrated a meritorious defense. Even if these conclusions are in the affirmative, the trial court still must determine whether the plaintiff will be prejudiced and whether culpable conduct on the part of the defendant resulted in the default. Our review of this sequence of determinations by the trial court is limited to a determination of whether in resolving these questions the trial

court abused its discretion. *Carlson v. Carlson*, 836 P.2d 297, 301 (Wyo. 1992); *followed in Whitney*, 892 P.2d at 794; *Vanasse*, 847 P.2d at 996.

Fluor Daniel urges that its failure to answer the Complaint within the time provided in the rules was the result of excusable neglect and that the default should have been set aside pursuant to WYO. R. CIV. P. 60(b)(1). For these purposes, excusable neglect is "such behavior as might be the act of a reasonably prudent person under the circumstances." *Booth v. Magee Carpet Co.*, 548 P.2d 1252, 1255 (Wyo. 1976); *quoted in Carlson*, 836 P.2d at 303. The evidence offered by Fluor Daniel of excusable neglect was the affidavit of the paralegal responsible for receiving service of process at the California headquarters. The paralegal stated that the standard practice for receiving service of process was for her office to date-stamp the documents, route them to an attorney, and internally docket them. She further stated that in this instance, the Seward Complaint and Summons somehow bypassed the system and mysteriously disappeared until October 17, 1996, ten days after the Entry of the Default Judgment, when the documents were discovered on her desk.

Fluor Daniel did not question that the process was received at its corporate headquarters on September 10, 1996, but asserts that because of a clerical or other unknown error it did not discover the Summons and Complaint until some thirty-eight days later. The explanation for the deficiency in handling was a very hectic and busy schedule described by the paralegal in her affidavit. The district court found that this explanation failed to demonstrate excusable neglect and that the culpable conduct of Fluor Daniel led to the Entry of Default and the Default Judgment. Even though Fluor Daniel vigorously asserts that this is the first time it ever failed to answer a complaint on time, we do not review the business practices of Fluor Daniel but only the prospect of the abuse of discretion by the trial court.

We hold that the trial court could view the unexplained failure of Fluor Daniel's business practice with respect to service of process as careless and within Fluor Daniel's control, and its finding does not constitute an abuse of discretion. *See Whitney*, 892 P.2d at 794 ("[s]ufficient grounds for relief do not exist when a party is dilatory in obtaining legal counsel and default judgment is entered against him."); *Vanasse*, 847 P.2d 998 (primary argument that ongoing settlement negotiations constituted "excusable neglect" held insufficient); *Matter of Injury to Seevers*, 720 P.2d 899, 903 (Wyo. 1986) ("failure to consult an attorney for nearly two months is not such excusable neglect as would justify relief ***."); *Booth*, 548 P.2d at 1254 (failure to employ an attorney until 53 days following the service of process would not constitute excusable neglect).[1] We do not discern any evidence in this record that would qualitatively distinguish Fluor Daniel's neglect from the styles of neglect found insufficient to constitute excusable neglect in our prior decisions. We hold that the trial court did not abuse its discretion in concluding that the neglect was not excusable and that Fluor Daniel's culpable conduct lead to the Entry of Default and the Default Judgment.

We turn to the argument by Fluor Daniel that this Default Judgment should be set aside because of fraud, misrepresentation, or other misconduct by Seward in connection with the proof of damages. Fluor Daniel relies upon the provisions of WYO. R. CIV. P. 60(b)(3) in submitting this argument. A higher standard of proof is applicable when this ground is asserted because in order to prevail the party in default must establish the Plaintiff's misconduct by clear and convincing evidence:

---

[1] In 1993 the Supreme Court of the United States made the concept of "excusable neglect" under the federal rules substantially more liberal. *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (U.S. Tenn. 1993). We elect to continue to following our Wyoming rule.

> Where fraud and misrepresentation is relied upon as a ground for relief sought pursuant to a Rule 60(b) motion, it must be proved by clear and convincing evidence. Fraud is never presumed, and the burden of proof to clearly establish such fraud or misrepresentation is upon the party seeking relief.

Stevens v. Murphy, 680 P.2d 78, 79 (Wyo. 1984). This provision in the rule is not intended to permit the defendant to litigate the factual matters already established pursuant to WYO. R. CIV. P. 55. *See* 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2860 at 310-17 (1995).

In invoking WYO. R. CIV. P. 60(b)(3), Fluor Daniel advances a litany of alleged "misrepresentations" by Seward. It claims, among other things, that Seward resigned and was not terminated. Fluor Daniel also argues that Seward never was offered the promotion that his computation of damages assumed he would have received. Further, Fluor Daniel insists that the "environmental coordinator" position, that Seward contended he was offered, does not exist, and that even if he were promoted, Seward's pay scale would have remained constant.

On the record, Seward responded to all of these contentions. He directed attention to the deposition of a Fluor Daniel manager who admitted offering Seward the choice to resign or be terminated. The manager also testified by deposition that Seward's former supervisor served in the role of "environmental coordinator" and appears in that role on an organization chart of the company. The manager also revealed that he had discussed that coordinator position with Seward, but he denied ever offering the position to Seward. Finally, Seward points to evidence in the record that the company had, in the past, placed that position at a higher pay scale.

The trial judge heard arguments of both of the parties and articulated his decision in a letter in this way:

> Defendant offers evidence which conflicts with some of the claims of Plaintiff. However, I am not persuaded that these factual disagreements rise to the level of demonstrating fraud or misrepresentation by Plaintiff. Factual disagreements do not necessarily demonstrate fraud or misrepresentation. There is a reasonable basis for the positions taken by Plaintiff. Therefore, I do not find that Defendant has met its burden of proving fraud or misrepresentation.

The opinion of the trial judge is reasoned and manifests a sound judgment exercised with regard to what is right under the circumstances. We do not perceive it to be arbitrary or capricious. We acknowledge a temptation to review the damage award because of the amount awarded, but we are foreclosed from any review other than assessing the denial of the motion for relief under the abuse of discretion standard.

A final argument presented by Fluor Daniel is that it is entitled to relief under the provision of WYO. R. CIV. P. 60(b)(6) that permits relief for "any other reason justifying relief from the operation of the judgment." In *Vanasse*, 847 P.2d at 998, we espoused the concept that this provision of WYO. R. CIV. P. 60(b) should be invoked only under extraordinary circumstances. For example, we have held that grossly negligent representation by counsel does not entitle a litigant to relief under this provision. *Hochhalter v. Great Western Enterprises, Inc.*, 708 P.2d 666, 669-70 (Wyo. 1985). The award in this case is significant, and the Default Judgment was entered very expeditiously, but the Wyoming Rules of Civil Procedure were complied with at all times. This is not a situation involving extraordinary circumstances entitling Fluor Daniel to relief under this provision.

Fluor Daniel has failed to establish its claimed grounds for relief under WYO. R. CIV. P. 60(b). This also demonstrates a lack of "good cause" under WYO. R. CIV. P. 55(c) to set aside the Entry of Default. *Lee*, 947 P.2d at 793-94; *Vanasse*, 847 P.2d at 999. In light of the failure to establish a meritorious ground for relief, we do not need to consider the elements of prejudice to the plaintiff, and we agree with the trial court that the culpable conduct lead to the Entry of Default and Default Judgment.

The Order denying relief under the provisions of WYO. R. CIV. P. 55(c) and 60(b) is affirmed.

APPENDIX C -- ORDER OF THE CLERK OF THE SUPREME COURT OF WYOMING ASSIGNING CASE TO EXPEDITED DOCKET FILED MARCH 18, 1997

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1996

		In The Supreme Court State of Wyoming Filed
FLUOR DANIEL (NPOSR), INC., a Delaware corporation,	)	Mar 18 1997
Appellant (Defendant),	)	s/ Judy Pacheco Judy Pacheco, Clerk
v.	)	No. 97-18
DAVID G. SEWARD,	)	
Appellee (Plaintiff).	)	

ORDER ASSIGNING CASE TO EXPEDITED DOCKET

The Court, having carefully considered the appellant's and appellee's briefs in the above-captioned case, and finding that this case should be heard and disposed of by this Court upon the briefs of the parties without oral argument, has directed that this case be assigned to the Expedited Docket; it is therefore,

ORDERED that this case be assigned to the Expedited Docket pursuant to WYO.R.APP.P. 8.01(a) and (c); and,

NOTICE IS HEREBY GIVEN that the appeal of this matter will be taken under advisement and the decision of the Court will be rendered in a written opinion.

DATED this 18th day of March, 1997.

FOR THE COURT:

s/ Judy Pacheco
Judy Pacheco
Clerk of Court

APPENDIX D -- ORDER OF THE SUPREME COURT OF WYOMING DENYING MOTION OF FLUOR DANIEL (NPOSR), INC. TO REASSIGN CASE TO THE ORAL ARGUMENT DOCKET ENTERED APRIL 9, 1997

APRIL TERM, A.D. 1997

In The Supreme Court
State of Wyoming
Filed
APR -9 1997

s/ Judy Pacheco
Judy Pacheco, Clerk

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Appellant (Defendant),

v.

DAVID G. SEWARD,

Appellee (Plaintiff).

No. 97-18

DENIAL OF THE APPELLANT'S MOTION TO REASSIGN CASE TO THE ORAL ARGUMENT DOCKET

This matter came before the Court upon the appellant's motion to have the case reassigned from the expedited docket to the oral argument document. Having carefully considered the foregoing motion, the Court finds that the motion should be denied. It is, therefore,

ORDERED that the motion of the appellant for reassignment of this appeal to the oral argument docket be, and the same hereby is denied.

DATED this 8th day of April, 1997.

FOR THE COURT:

s/ William A. Taylor
William A. Taylor
Chief Justice

APPENDIX E -- ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING ENTERED DECEMBER 12, 1998

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

CERTIFIED COPY

FILED
Dec 12 1996
Sue Pate
Clerk of District Court
By s/ Carol Spivey
Deputy

ORDER

THIS MATTER having come before the Court on the 25th day of November, 1996 for hearing of Defendant's motion to set aside the entry of default and the default judgment, and Plaintiff appearing by and through his attorney, Mark W. Gifford of Gifford & Bonner, and Defendant appearing by and through its attorney, Bruce N. Willoughby of Brown, Drew, Massey & Sullivan, and the Court having re-

viewed the parties' submittals, having heard the arguments of counsel and being fully advised in the premises, FINDS:

1. Culpable conduct by the Defendant led to the entry of default and default judgment. Considering the inexcusable neglect of Defendant in this instance, relief cannot be granted under Rule 60(b)(1) or (6).

2. Defendant has not met its burden of proving fraud, misrepresentation or other misconduct by Plaintiff which would entitle Defendant to relief under Rule 60(b)(3).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's motion to set aside the entry of default and the default judgment is denied.

2. A copy of the Court's decision letter dated December 3, 1996 is attached hereto and by this reference incorporated herein.

SO ORDERED this 12th day of December, 1996.

BY THE COURT:
s/ Dan Spangler
State District Court Judge

Approved as to Form:
s/ Mark W. Gifford
Counsel for Plaintiff

s/ Bruce N. Willoughby
Counsel for Defendant

APPENDIX F -- DECISION LETTER OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING FILED DECEMBER 3, 1996

The State of Wyoming
Seventh Judicial District

Dan Spangler, Judge
Sara McDowell, Reporter

Natrona County Courthouse,
Room 214
200 North Center Street
Casper, Wyoming 82601
Phone (307) 235-9253

December 3, 1996

FILED
Dec 03 1996
Sue Pate
Clerk of District Court
By s/ Roberta Hartford
Deputy

Mr. Mark W. Gifford
Attorney at Law
Post Office Box 2519
Casper, Wyoming 82602

Mr. Bruce N. Willoughby
Attorney at Law
Suite 800
123 West First Street
Casper, Wyoming 82601

Re: Seward v. Fluor Daniel
Civil Action No. 74525

DECISION LETTER

Gentlemen:

The above matter has come before the Court upon a motion by Defendant to set aside the entry of default and default judgment. I am not persuaded that the Defendant has met its burden. Therefore, the motion will be denied.

Defendant argues that its failure to file an answer was the result of mistake, inadvertence, excusable neglect, or other reason justifying relief. In the case of Vanasse v. Ramsay, 847 P.2d 993 (Wyo. 1993), the Wyoming Supreme Court held that a litigant is not necessarily entitled to relief because his counsel was grossly negligent. It would follow that a party is not entitled to relief because of its own inexcusable neglect. In the Vanasse case, the Supreme Court found that the Defendant was not entitled to relief because culpable conduct was responsible for entry of the default judgment. Culpable conduct is found if the failure to answer was the result of neglect or intentional indifference. Lantz v. Bowman, 881 P.2d 1079 (Wyo. 1994). A number of cases have held that failure to place legal documents in the hands of counsel in time to file an answer is inexcusable neglect. Thus, considering the inexcusable neglect of Defendant in this instance, relief cannot be granted under Rule 60(b)(1) or (6).

Defendant further argues that the judgment should be set aside under Rule 60(b)(3) because there was fraud, misrepresentation, or other conduct by Plaintiff. Defendant offers evidence which conflicts with some of the claims of Plaintiff. However, I am not persuaded that these factual disagreements rise to the level of demonstrating fraud or misrepresentation by Plaintiff. Factual disagreements do not necessarily demonstrate fraud or misrepresentation. There is a reasonable basis for the positions taken by Plaintiff. Therefore, I do not find that Defendant has met its burden of proving fraud or misrepresentation.

Mr. Gifford is requested to prepare an order denying the motion for approval as to form by Mr. Willoughby.

Sincerely,
s/ Dan Spangler
Dan Spangler

DS:bh

APPENDIX G -- DEFAULT JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING ENTERED OCTOBER 7, 1996

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

FILED
Oct 07 1996
Sue Pate
Clerk of District Court
By s/ Carol Spivey
Deputy

DEFAULT JUDGMENT

THIS MATTER having come before the Court pursuant to Plaintiff's Motion for Default Judgment, and the Court having reviewed the motion, the affidavits in support thereof, being fully advised in the premises and finding no need for further hearing in the matter, finds generally in favor of Plaintiff upon the grounds set forth in said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be, and the same hereby is, entered in favor of Plaintiff and against Defendant in the sum of $562,489.00, with interest at the legal rate of ten percent per annum from the date of this judgment until paid, upon which execution may issue.

SO ORDERED this 7th day of October, 1996.

BY THE COURT:
s/ Dan Spangler
State District Court Judge

APPENDIX H -- ENTRY OF DEFAULT OF THE CLERK OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING FILED OCTOBER 2, 1996

STATE OF WYOMING) :SS		IN THE DISTRICT COURT
COUNTY OF NATRONA)		SEVENTH JUDICIAL DISTRICT
DAVID G. SEWARD,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 74525
vs.	)	FILED
	)	Oct 02 1996
FLUOR DANIEL (NPOSR), INC.,	)	Sue Pate
a Delaware corporation,	)	Clerk of District Court
	)	By s/ Kay Sandford
Defendant.	)	Deputy

ENTRY OF DEFAULT

THIS MATTER having come before the Court upon motion of Plaintiff for entry of default herein, and the Clerk having reviewed the matter and being fully advised in the premises, and it appearing that Defendant has failed to answer or otherwise respond to Plaintiff's complaint within the time required by the Wyoming Rules of Civil Procedure,

IT IS THEREFORE ORDERED that the default of Defendant be, and the same hereby is, entered pursuant to Rule 55(a), W.R.Civ.P.

SO ORDERED this 2 day of October, 1996.

SUE PATE
s/ Kay Sandford
Clerk of Court
Deputy Clerk of Court

APPENDIX I -- PETITION FOR REHEARING FILED APRIL 27, 1998 BY FLUOR DANIEL (NPOSR), INC. WITH THE SUPREME COURT OF WYOMING IN CASE NO. 97-18

IN THE SUPREME COURT

OF THE STATE OF WYOMING

FLUOR DANIEL (NPOSR), INC., a Delaware corporation, Appellant (Defendant below), v. DAVID G. SEWARD, Appellee (Plaintiff below).	IN THE SUPREME COURT STATE OF WYOMING FILED APR 27 1998 s/ Judy Pacheco JUDY PACHEDO, CLERK Case No. 97-18

PETITION FOR REHEARING

COMES NOW Appellant Fluor Daniel (NPOSR), Inc., by and through its counsel, Brown, Drew, Massey & Sullivan, and pursuant to Rule 9.07 of the Wyoming Rules of Appellate Procedure, hereby petitions the Court for a rehearing on its decision rendered in the above-captioned appeal on April 10, 1998. Appellant has submitted and filed concurrently with this Petition, its brief in support of the petition for rehearing setting forth in detail the grounds upon which a rehearing is requested.

The grounds for granting a rehearing in this matter include the Court's failure to address Due Process and public policy concerns in its April 10, 1998, decision. In addition, the Court's application of Rules 55 and 60 of the Wyoming

Rules of Civil Procedure is overly strict in light of the more liberal standard applied by federal courts under the Federal Rules of Civil Procedure, after which the Wyoming Rules of Civil Procedure have been modeled. Finally, the Court, at a minimum, should have remanded this case for a full hearing on the issue of damages in light of Appellant's right to due process of law prior to the entry of a final decision affecting a property interest.

WHEREFORE, Appellant prays that the Court grant a rehearing in this matter, and that, upon a rehearing, vacate its prior opinion and order the reversal of the district court's decision denying Appellant's motion to set aside the default and default judgment entered in the case below.

DATED this 27th day of April, 1998.

Respectfully submitted,

FLUOR DANIEL (NPOSR), INC.,
Appellant

By: s/ Donn J. McCall
DONN J. McCALL
and
KEITH MILES AURZADA
Brown, Drew, Massey & Sullivan
Casper Business Center
Suite 800
123 West First Street
Casper, Wyoming 82601
(307) 234 - 1000

Attorneys for Appellant
Fluor Daniel (NPSOR), Inc.

Certificate of Service

The undersigned, one of the attorneys for Appellant Fluor Daniel (NPOSR), Inc., does hereby certify that on the 27th day of April, 1998, the above and foregoing **Petition for Rehearing** was served upon counsel for Appellee in above-entitled appeal by depositing a true and correct copy of the same in the United States mail, postage prepaid, and addressed as follows:

Mark W. Gifford
Post Office Box 2519
Casper, Wyoming 82602

s/ Donn J. McCall

APPENDIX J -- BRIEF OF APPELLANT IN SUPPORT OF PETITION FOR REHEARING FILED APRIL 27, 1998 BY FLUOR DANIEL (NPOSR), INC. WITH THE SUPREME COURT OF WYOMING IN CASE NO. 97-18

IN THE SUPREME COURT
OF THE STATE OF WYOMING

		IN THE SUPREME COURT STATE OF WYOMING
FLUOR DANIEL (NPOSR), INC., a Delaware corporation,	)	FILED
	)	APR 27 1998
	)	s/ Judy Pacheco
Appellant (Defendant below),	)	JUDY PACHECO, CLERK
	)	Case No. 97-18
v.	)	
DAVID G. SEWARD,	)	
Appellee (Plaintiff below).	)	

BRIEF OF APPELLANT IN SUPPORT OF PETITION FOR REHEARING

Submitted by:

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Rule 9.07(a), W.R.A.P. 1

Pursuant to Rule 9.07 of the Wyoming Rules of Appellate Procedure, Appellant Fluor Daniel (NPSOR), Inc. ("Appellant"), by and through its counsel, Brown, Drew, Massey & Sullivan, respectfully submits this brief in support of its petition for rehearing of the decision rendered by the Court in this case on April 10, 1998 in *Fluor Daniel (NPSOR), Inc. v. Seward*, No. 97-18 (Wyo. Sup. Ct. April 10, 1998).

I.

STANDARD FOR PETITION FOR REHEARING

The Wyoming Rules of Appellate Procedure authorize applications for rehearing of a case in the Wyoming Supreme Court.[2] The Court will grant a rehearing where it wishes to reconsider a decision or concludes that there is a reasonable possibility that it may have arrived at an erroneous conclusion or overlooked some important question or matter necessary to a correct decision. *Wightman v. American National Bank of Riverton*, 610 P.2d 1001, 1002 (Wyo. 1980) (stating that, "[u]pon rehearing which was granted in

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[2] Rule 9.07(a) of the Wyoming Rules of Appellate Procedure states that:

> [a]n application for rehearing of a case in the appellate court shall be by petition to that court, signed by counsel, briefly stating the points wherein it is alleged that the appellate court has erred, and shall be filed within 15 days after the decision is rendered. The petition shall be accompanied by a brief covering the points and authorities upon which the petitioner relies. A copy of the petition and the brief shall, within the time above specified, be served upon the opposing party or the attorney of record. There shall be no oral argument on petitions for rehearings unless argument is requested by the appellate court.

Rule 9.07(a), W.R.A.P.

this case a majority of the court became convinced that the court in its original opinion arrived at an erroneous conclusion"); *Elmer v. State,* 466 P.2d 375, 376 (Wyo. 1970). Significantly, a petition for rehearing also may be granted on a constitutional issue not raised below or in the original appeal if the public interest is involved. *Madden v. Wild, State Examiner*, 48 Wyo. 372, 377-78, 49 P.2d 637 (1935); *see generally Steffey v. City of Casper*, 358 P.2d 951 (Wyo. 1961). As set forth below, Appellant has raised issues worthy of reconsideration by the Court.

II.

ARGUMENT

A. Due Process and Public Policy Considerations Require that Rehearing be Granted and the Default Judgment Entered in this Case be Set Aside.

This Court's decision of April 10, 1998, essentially creates a judicial lottery whereby any plaintiff need merely file a complaint in order to enter, and if after technically complying with the rules of service of process a defendant fails to answer, for whatever reason, the plaintiff wins. The amount of plaintiff's prize, upon entry of default, is limited only by the unchallenged "creativity" of the plaintiff and his counsel in dreaming up a wish list of damages because, under the rules permitted by the opinion of the Court in this case, a defendant's due process rights are wholly irrelevant in the court below, and in the standard of nonreview adopted in the opinion, by this Court as well.

Under this Court's opinion, a corporation that, as demonstrated by the undisputed facts, never learned of the commencement of the action below, despite its use of reasonable procedures to avoid such a result, is denied any opportunity to present a defense to a claim (whether it has merit or not), let alone be heard on the right of damages it must pay, simply because it never receives actual notice of the filing of a lawsuit thousands of miles away. Such a ruling flies in the face of any reasonable notion of due process, and

the Court's opinion creating such a lottery should, and it is respectfully submitted must, be reversed on rehearing. At a minimum, due process demands that the matter be remanded with instructions to hold a proper hearing on the amount of damages to be awarded to Appellee - this time with Appellant being afforded an opportunity to be heard on the issue.

The cornerstone of our judicial system is the notion of due process under the law whereby each litigant has the right to a meaningful opportunity to be heard and to present evidence before any decision is entitled to the dignity of finality. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 656-57, 94 L.Ed. 865 (1950); *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L.Ed.2d 113, 118 (1971); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 99 L.Ed.2d 75, 81 (1988). This constitutionally granted right is not to be lightly discarded. *Boddie v. Connecticut, supra*, 401 U.S. at 379; *Peralta v. Heights Medical Center, Inc., supra,* 485 U.S. at 86-87. This is not to say, of course, that a defendant is free to ignore the service of a summons and complaint without fear of any adverse consequences. Quite the contrary, Appellant comprehends the policy of finality to litigation through deterence to late filing litigants. *Vanasse v. Ramsey*, 847 P.2d 933, 1000 (Wyo. 1993). However, the Court has modified the standard set forth in Rule 60(b)(1) of the Wyoming Rules of Civil Procedure and the Court's prior decisions from one of excusable neglect to one of absolute intolerance for any mistake, inadvertence, surprise, or neglect (whether or not excusable). This absolute standard is directly contrary to the long-standing policy of this Court to weigh the consideration of finality with the rudimentary policies that default judgments are not favored in the law and that Rules 55 and 60 of the Wyoming Rules of Civil Procedure are remedial and should be construed liberally in view of the preference that cases should be tried on the merits.[3]

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[3] *Gifford v. Casper Neon Sign Co., Inc.*, 639 P.2d 1385, 1389 (Wyo. 1982); *Westring v. Cheyenne National Bank*, 393 P.2d 119, 122 (Wyo. 1964); *Lake v. Lake*, 63 Wyo. 375, 400, 182 P.2d 824 (1947); *Mid-*

In this regard, Appellant respectfully suggests that the Court overlooked this fundamental issue and the remedial underpinnings of Rules 55 and 60, which was necessary to a correct decision, and that a rehearing should be granted on such issue.

In its decision, the Court treated Appellant's failure to timely appear with the same disdain as defendants who had *actual knowledge* of service of process but, for whatever reason, intentionally or recklessly failed to appear. For example, the Court relied on several cases holding that a default judgment should not be set aside where the defendant has knowingly or intentionally failed to respond to process as support for its ruling that the district court had not abused its discretion in finding that Appellant's neglect was not excusable.[4] *Whitney v. McDonough*, 892 P.2d 791, 794 (Wyo. 1995) (dilatory conduct in obtaining legal counsel is not a sufficient ground for setting aside a default judgment); Vanasse *v. Ramsay*, *supra*, 847 P.2d at 998 (ongoing settlement negotiations commenced prior to filing of lawsuit insufficient as excusable neglect); *Matter of Injury to Seevers*, 720 P.2d 899, 903 (Wyo. 1986) (deliberate decision to not retain counsel for nearly two months is not such excusable neglect as would justify relief); *Booth v. Magee Carpet Co.*, 548 P.2d 1252, 1254 (Wyo. 1976) (failure to employ an attorney until 53 days after service of process does not constitute excusable neglect). The common thread in these cases, as well as all of the other reported cases in Wyoming jurisprudence, is that the defendant knew of the litigation,

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way Oil Corp. v. Guess, 714 P.2d 339, 347 (Wyo. 1986); *Claassen v. Nord*, 756 P.2d 189, 193 (Wyo. 1988); *Spitzer v. Spitzer*, 777 P.2d 587, 591 (Wyo. 1989); *Matter of Estate of Mora (Mora v. Husky Oil Company)*, 611 P.2d 842, 849 (Wyo. 1980); *Carlson v. Carlson*, 836 P.2d 297, 301 (Wyo. 1992); and *McGarvin-Moberly Construction Co. v. Welden*, 897 P.2d 1310, 1314 (Wyo. 1995); *see also Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L.Ed. 266 (1949).

[4] *Fluor Daniel (NPSOR), Inc. v. Seward*, No. 97-18, slip op. at 5 (Wyo. Sup. Ct. April 10, 1998).

knew of his duty to respond, but failed to ensure a proper response was timely filed.

In light of the competing policy considerations that guide a decision to set aside a default judgment, Appellant does not question the prior decisions of this Court to allow a default to stand in such circumstances.[5] Here, however, the uncontested record demonstrates that Appellant never received any notice of the filing of the action. R. at 80. It is also uncontested that Appellant had a series of careful procedures in place to prevent just such a default. R. at 79-81. In such circumstances, which truly is a matter of first impression for this Court, a party simply must be given an opportunity to exercise its due process rights and have its day in court. *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L.Ed. 266, 278 (1949) (stating that, "[f]air hear-

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[5] There are only two cases in Wyoming jurisprudence where this Court has reviewed the propriety of a default judgment against a corporation for failing to respond to service of process. In the first case, *Midway Oil Corp. v. Guess*, 714 P.2d 339 (Wyo. 1986), the Court did not apply Rules 55 and 60, but instead held that an entry of default and subsequent default judgment entered prior to the expiration of the answer date, and without notice to the corporation of the existence of the litigation, eliminated any discretion in the trial court other than to set aside the default judgment upon the seasonably filing of a motion to do so. *Id.*, 714 P.2d at 345.

The second case, *U.S. Aviation, Inc. v. Wyoming Avionics*, 664 P.2d 121 (Wyo. 1983), is factually dissimilar to the case now before the Court. In that case, service of process was made upon the Wyoming Secretary of State due to the failure of the defendant corporation to maintain a registered agent for service of process in Wyoming. *U.S. Aviation*, 664 P.2d at 124. The Court, in affirming the trial court's decision that the defendant had not established a sufficient ground under Rule 60(b)(1) to set aside the resulting default judgment, correctly held that the defendant's behavior was inappropriate under the circumstances, including, among other things, its failure to maintain a registered agent, and that relief based upon mistake, inadvertence, surprise, or excusable neglect was not appropriate despite the corporation's lack of actual knowledge of service of process. *Id.*, 664 P.2d at 126. That case, however, is not applicable here, as Appellant had an authorized agent who received process and was a corporation in good standing at the time the default judgment was entered. None of the circumstances present in *U.S. Aviation* are present in this case.

ings are in accord with elemental concepts of justice. . ."). Before Appellant's opportunity to be heard on the merits under due process of law is terminated by a default judgment, the Court must consider that there was no willing failure to respond to service of process.[6] This is especially important in light of the fact that Appellant received no actual notice of either the complaint or the entry of default. *Ameday v. United States Trucking Company*, 62 F.R.D. 72, 73 (E.D. Penn. 1974); *cf. Midway Oil Corp. v. Guess*, 714 P.2d 339, 343 (Wyo. 1986) (attempted substitute service on a corporate defendant by service on the Wyoming Secretary of State was insufficient to confer jurisdiction and did not comply with due process and statutory requirements essential to the validity of the resulting default judgment).

Based upon the unique facts of this case and its importance to Appellant and as a matter of public policy, the Court should have considered and weighed all of the four factors enumerated in *Whitney*. *See Whitney v. McDonough*, 892 P.2d at 794.[7] These factors include, in addition to consideration of the grounds for relief enumerated in Rule 60(b), whether Appellant has shown a meritorious defense, whether Appellee will be prejudiced, and whether Appellant acted culpably.[8] Failure to consider the district

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6 Appellant acknowledges that the entry of a default judgment does not *per se* violate the due process guarantees found in the Fourteenth Amendment to the United States Constitution. *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876). In *Windsor*, however, the United States Supreme Court stated that while a default is proper when a defendant, after adequate notice, chooses not to appear and exercise his right to be heard, "the denial of the right to appear and be heard at all is a different matter altogether." *Id.*, 93 U.S. at 278.

7 The Court should be mindful that the ultimate policy underlying Rules 55 and 60 of both the Wyoming Rules of Civil Procedure and the Federal Rules of Civil Procedure is to do justice. 10 Wright & Miller, Federal Practice and Procedure, § 2681, n. 23 (1983 & Cum. Supp. 1997).

8 The Court did hold that the culpable conduct of Appellant lead to the entry of default and the default judgment; however, this holding was based solely upon the district court's finding that Appellant's neglect was

court's review of these factors is an error of law, which should be reexamined by the Court. As previously briefed by Appellant, a meritorious defense was shown to the district court and this Court. R. at 55-89. Moreover, Appellee will not be prejudiced, and Appellant did not engage in any culpable conduct. R. at 61-63, 66-67. These factors have been previously considered by the Court in its earlier decisions and are routinely considered by the federal courts in their review of default judgments under the Federal Rules of Civil Procedure, upon which the Wyoming Rules of Civil Procedure are patterned. The Court's failure to consider and weigh the district court's analysis of these factors was error that should be reexamined in light of the drastic consequences imposed upon Appellant, and the substantial injustice of this default judgment in both its entry and its amount.

B. The More Liberal Federal Standard Establishing "Excusable Neglect" Should be Applied by this Court Based upon Public Policy and Due Process Considerations under the United States Constitution.

A default judgment is indeed a drastic remedy, and it forecloses a party's ability to dispute both liability and damages on the merits of the plaintiff's cause of action. Decisions regarding such drastic measures connote the possibility of other similar decisions in the future, and as a result, are a matter of public policy on which a rehearing is appropriate. *Madden v. Wild, State Examiner*, *supra*, 48 Wyo. at 377-78; *Steffey v. City of Casper*, *supra*.

Absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, *supra*, 401 U.S. at 377 . Appellant was denied its right to a hearing in this case because of its failure to file an answer within the time period required under Rule 12(a) of the Wyoming Rules

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not excusable. *Fluor Daniel (NPSOR), Inc. v. Seward*, No. 97-18, slip op. at 5-6 (Wyo. Sup. Ct. April 10, 1998).

of Civil Procedure. However, the same rules provide a mechanism to set aside the resulting default and default judgment, and the Court's failure to enforce such mechanisms in its review of the district court's decision is contrary to public policy and due process, especially where earnest efforts were made to respond to the default judgment as soon as notice of its entry was received by Appellant.

The stringent standard for proving excusable neglect employed by the Court in its opinion is tantamount to a judicial abrogation of Rules 55 and 60 of the Wyoming Rules of Civil Procedure. The application of this standard is entirely mechanistic and leaves no room for human error. Under the Court's holding, no matter how detailed and elaborate a system is established for receiving and responding to service of process, one single error, for which a human being is accountable, *ipso facto* will lead to a default judgment in the amount set forth in any affidavit the plaintiff may submit. Moreover, the consequences of such an error could be $1.00, $1,000,000.00, or $1,000,000,000.00 as the standard now created by this Court wholly fails to analyze, or balance, the interests at stake.

This result does not give effect to the remedial purpose of Rules 55 and 60 of the Wyoming Rules of Civil Procedure or to the litany of cases in which this Court has repeatedly held that default judgments are not favored. Instead, the "Wyoming rule", as enunciated by the Court in its opinion, gives judicial sanction to a "lottery system" in which plaintiffs, seizing upon the opportunity of a defendant's failure to answer, submit an affidavit for a prodigious sum of unliquidated damages (limited only by the conscience of the plaintiff's attorney) and collect the award without proving their case on the merits or their claim for damages. *See generally, Whitney v. McDonough*, *supra*, 892 P.2d at 795 (dissent, Taylor, J.). Thus, as decisions upholding a trial court's failure to set aside a default judgment are rendered, plaintiffs in Wyoming will find more and more incentive to expeditiously seek default judgments for whatever amounts they and their counsel believe they can get away with, hope and pray a default is taken, take no steps of professional

courtesy to ensure the defendant is actually aware of the suit, knowing that the default judgment will withstand judicial scrutiny as long as "the Wyoming Rules of Civil Procedure [are] complied with at all times." *Fluor Daniel (NPOSR), Inc. v. Seward*, No. 97-18, slip op. at 7 (Wyo. Sup. Ct. April 10, 1998). It is respectfully submitted that the sanction, and *de facto* encouragement, of such a lottery system is bad public policy.

Other courts have held that before a default judgment is entered, the defendant is entitled to notice of the judgment's consequences, whether the default is the result of inaction or willful obstruction. *Greenup v. Rodman*, 42 Cal.3d 822, 726 P.2d 1295, 1299 (1986). This is true even where notice is not required under the applicable rules of procedure.[9] *Traders Bank of Kansas City v. Cherokee Investment Co, Inc.*, 642 S.W.2d 122, 125 (Mo.App. 1982) (stating, "[a]side from all of the foregoing, and even if Cherokee may have been technically in default for failure to make a timely appearance so as not to be entitled to notice under Rule 74.78, nevertheless it was entitled to notice as a matter of constitutional due process").

In this case, Appellant received no actual notice of the complaint due to the neglect of its paralegal. However, Appellant also did not receive notice of Appellee's application for entry of default judgment following the entry of default. Under the doctrine espoused in *Traders Bank*, when coupled with the lack of a meaningful opportunity under the "Wyoming rule" to obtain judicial review of the propriety of a default judgment when entered without notice, the gravity of the entry of a default judgment compels that notice be given

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[9] Rule 55(b)(2) of the Wyoming Rules of Civil Procedure provides that if the party against whom the default judgment is sought has appeared in the action, he shall be served with written notice of the application for judgment at least three days prior to the hearing on the application, which will be limited to the issue of damages. Rule 55(b)(2), W.R.Civ.P. The right to trial by jury on the issue of damages also is contemplated by Rule 55(b)(2). The Rule, however, implies that if the party has not appeared, notice of the application for a default judgment is not required to be given to him.

as a fundamental right. This is particularly compelling in Wyoming in light of the precedent set forth in *McGarvin-Moberly Construction Co. v. Weldon*, which allows a defendant against whom default has been entered in a negligence case but who has appeared through counsel prior to a hearing on the application for default judgment, to defend on the issues of fault and damages. *See McGarvin-Moberly Construction Company v. Welden*, 897 P.2d 1310, 1316-17 (Wyo. 1995).

In *McGarvin-Moberly*, this Court held that the defendant in that case, who had appeared through counsel after an entry of default but before the default judgment was entered, was entitled to participate in discovery and to a trial before a jury on the merits of the damages claims of the plaintiff and the degree of fault for which the defendant was liable. *McGarvin-Moberly*, *supra*, 897 P.2d at 1314. Accordingly, under the Court's decision in *McGarvin-Moberly*, a defendant who **knowingly and intentionally** fails to answer a complaint may then appear and defend the case on the issue of damages through discovery and at a trial before a jury. In this case, however, Appellant, as a party that earnestly wished to answer the complaint, but was prohibited from doing so based upon its lack of knowledge of the litigation due to human error, is denied the panoply of rights that were accorded to the fortuitous defendant in the *McGarvin-Moberly* case or, for that matter, would be accorded to any defendant who chooses, for whatever reason, to miss the answer date but who appears through counsel before the entry of a default judgment. This dichotomy of circumstances brings to mind the wisdom of the following words echoed by this Court in *Lake v. Lake* over 50 years ago:

> Judgments by default are not favored. Courts prefer that cases be tried upon the merits. "It is generally recognized that the discretionary power of the court should be liberally exercised in furtherance of justice, to the end that cases may be disposed of upon their merits rather than upon technicalities or fortuitous circum-

stances." *Citing* 1 Freeman on Judgments 580, Sec. 292.

Lake v. Lake, 63 Wyo. 375, 400, 182 P.2d 824 (1947).

This Court on other occasions has consistently stated that because the Wyoming Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, it will look to decisions interpreting the federal rules for guidance in interpreting its own rules. *Glover v. Giraldo*, 824 P.2d 552, 556 (Wyo. 1992); *Lane Company v. Bush Development, Inc.*, 662 P.2d 419, 423 (Wyo. 1983); *Whitefoot v. Hanover Insurance Company*, 561 P.2d 717, 720 (Wyo. 1977). As acknowledged by the Court in its opinion in this case, the federal standard for determining what sorts of neglect will be considered "excusable" is more liberal than that applied by the Court, despite the Court's prior announcements that default judgments are disfavored in preference of trials on the merits. *See Fluor Daniel (NPSOR), Inc. v. Seward*, No. 97-18, slip op. at 5, n.1 (Wyo. Sup. Ct. April 10, 1998), citing *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993)[10]; *see also, Kinnear Corporation v. Crawford Door Sales Company*, 49 F.R.D. 3, 7 (D. S.C. 1970); *Wagstaff-El v. Carlton Press Company*, 913 F.2d 56, 57 (2d Cir. 1990) (default may be set aside even where failure to answer is willful in the presence of a meritorious defense).

Thus, in this case and in light of its mechanistic application of the stricter "Wyoming rule" regardless of whether a defendant has the right to notice and a jury trial on dam-

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10 In *Pioneer Investment*, the United States Supreme Court stated that for purposes of Rule 60(b) of the Federal Rules of Civil Procedure, the term "excusable neglect" encompasses circumstances in which the failure to comply with a filing deadline is attributable to negligence, unlike the "Wyoming rule" which does not appear to make allowance for negligence or fault. Moreover, the Court stated that "[b]ecause of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute 'neglect.'" *Pioneer Investment v. Brunswick, supra*, 507 U.S. at 394.

ages under the provisions of Rule 55(b)(2), the Court erred by not applying the more liberal standard, at least to the class of unknowing defendants who are not fortunate to receive notice and to exercise the right to a jury trial on damages before a default judgment is entered, that is applied by the federal courts pursuant to the Federal Rules of Civil Procedure, after which the Wyoming Rules of Civil Procedure are modeled.

C. At a Minimum, Appellant Should be Entitled to a Hearing on the Amount of Damages to be Awarded to Appellee.

At a minimum, the Court should remand the matter with instructions for the district court to hold an appropriate hearing, this time with Appellant present and able to be heard, solely on the issue of damages to be awarded. *See Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d 1056, 1065 (Wyo. 1986). If due process is to mean anything in Wyoming it must, at least, give Appellant this limited relief. *Mullane v.Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at 313; *Boddie v. Connecticut, supra*, 401 U.S. at 377.

III.

Conclusion

Default judgments are intended to deter defendants from intentionally failing to answer. Rules 55 and 60(b) of the Wyoming Rules of Civil Procedure were established to remedy such defaults where improvidently granted and where justice would not be served by their enforcement. By applying such a strict standard for setting aside a default judgment entered in the circumstances here, the Court has judicially abrogated these rules and the policy behind their establishment. The Court's decision is also dangerous public policy, as it sanctions, if not encourages, a judicial lottery system in the courts below. This decision is contrary to existing rules of procedure and the historical policy underlying such rules and, most significantly, has the effect of denying Appellant its fundamental right of due process guaranteed

under the United States Constitution without any rational basis for doing so.

Respectfully submitted this 27th day of April, 1998.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation, Appellant

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Certificate of Service

The undersigned, one of the attorneys for Appellant Fluor Daniel (NPOSR), Inc., does hereby certify that on the 27th day of April, 1998, the above and foregoing **Brief of Appellant in Support of Petition for Rehearing** was served upon counsel for Appellee in above-entitled appeal by depositing a true and correct copy of the same in the United States mail, postage prepaid, and addressed as follows:

Mark W. Gifford
Post Office Box 2519
Casper, Wyoming 82602

s/ Donn J. McCall

APPENDIX K -- AFFIDAVIT OF ERIN C. KANTOR FILED NOVEMBER 20, 1996 WITH THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING IN CIVIL ACTION NO. 74525

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

Civil Action No. 74525

FILED
NOV 20 1996
SUE PATE
Clerk of District Court
By s/ Kay Sandford
Deputy

AFFIDAVIT OF ERIN C. KANTOR

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

ERIN C. KANTOR, being of lawful age, and being first duly sworn upon her oath, deposes and says as follows:

1. My name is ERIN C. KANTOR. Fluor Daniel (NPOSR), Inc. is a wholly-owned subsidiary of Fluor Daniel, Inc. ("Fluor Daniel"). I am a paralegal for Fluor Daniel and as such, I provide support services for Fluor Daniel and its

subsidiaries. I have held this position for over ten (10) years. I am the sole person responsible for receiving service of process at Fluor Daniel's office located in Irvine, California ("California Office").

2. I make this affidavit upon personal knowledge.

3. Fluor Daniel is a corporation which does business and receives service of process in all states throughout the United States, including Wyoming.

4. A standard practice exists within Fluor Daniel for receiving service of process, acquiring local counsel to defend Fluor Daniel or one of its subsidiaries when service of process is received, and ensuring that all complaints are answered timely.

5. The standard practice for receiving service of process includes several steps. When service of process arrives at the California Office after being received and routed by a registered agent for service of process in the state where process was served, the documents are date stamped by my secretary who then gives them to me. At that time, I give the documents to our in-house employment attorney's secretary to create a file and to prepare a copy of the documents for the attorney. The file is returned to me, and I enter the action on our computerized docket system. I then contact the employment attorney to begin arrangements for completing whatever action is necessary. If the action is brought in a state where Fluor Daniel or one of its subsidiaries does not have local counsel, arrangements are made for retaining local counsel.

6. In over ten (10) years of working at Fluor Daniel, I have neither been involved in nor know of any case where Fluor Daniel or any of its subsidiaries has failed to answer a complaint which has been properly served.

7. This standard practice for receiving service of process was in place on September 9, 1996 when Plaintiff,

David Seward, served process on The Prentice-Hall Corporation System, Inc., who is Fluor Daniel (NPOSR), Inc.'s registered agent for service of process in Wyoming.

8. I first read and became aware of Plaintiff's Complaint on October 17, 1996. I found the Complaint lying on my desk and do not know how it arrived there. It had not been date stamped as it would have been had the normal office procedure been followed. Upon reading the Complaint, I immediately initiated steps to respond to the Complaint.

9. On September 10, 1996, the entire legal staff at the California Office attended a funeral for the spouse of one of the department's long-time members. I believe this to be the day on which Plaintiff's service of process would have been received from The Prentice-Hall Corporation System, Inc. at the California Office.

10. From September 22, 1996 through September 25, 1996 the attorneys and paralegals in the California Office were absent for a legal conference sponsored by Fluor Daniel. The conference was called "Law-Con 96" and was designed to allow Fluor Daniel's in-house counsel located worldwide to obtain continuing legal education credits in 12 states. I spent a substantial portion of the week of September 16, 1996 through September 20, 1996 preparing conference materials, addressing the requirements of 12 states for continuing legal education credits and making travel arrangements for the attorneys attending the conference from throughout the United States and abroad.

11. On September 30, 1996, I reported for jury duty. I was selected as a juror and served in that capacity from the time I was called through October 7, 1996.

12. My secretary during September of 1996, who would have been responsible for date stamping all service of process received during that month, was transferred out of Fluor Daniel's legal department on September 30, 1996.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Erin C. Kantor
ERIN C. KANTOR

Subscribed and sworn to before me by ERIN C. KANTOR this 5th day of November, 1996.

Witness my hand and official seal.

s/ Carol K. Walker
Notary Public

My Commission Expires:
May 24, 1998

CAROL K. WALKER-NOTARY PUBLIC
COMM...#1022240
NOTARY PUBLIC-CALIFORNIA
ORANGE COUNTY
Comm. Expires May, 24, 1998

APPENDIX L -- ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING CONTINUING STAY OF EXECUTION AND ENFORCEMENT OF DEFAULT JUDGMENT AND FOR SUBSTITUTION OF SUPERSEDEAS BOND ENTERED JUNE 18, 1998

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

CERTIFIED COPY

FILED
Jun 18 1998
Sue Pate
Clerk of District Court
By s/ Wanda Davis
Deputy

ORDER CONTINUING STAY OF EXECUTION AND ENFORCEMENT OF DEFAULT JUDGMENT PENDING FILING BY FLUOR DANIEL (NPOSR), INC. OF PETITION FOR WRIT OF CERTIORARI FROM SUPREME COURT OF UNITED STATES AND FOR SUBSTITUTION OF SUPERSEDEAS BOND

THIS MATTER came before the Court on June 2, 1998, for a hearing on: (a) The motion of Plaintiff and Appellee, David G. Seward ("Appellee"), for an order allowing

him to proceed with the collection of the default judgment entered by the Court in the above-entitled civil action in favor of Appellee and against Defendant and Appellant, Fluor Daniel (NPOSR), Inc. ("Appellant"), in the sum of $562,489.00, plus interest (the "Default Judgment"), and directing the Clerk of this Court to proceed with collection of the supersedeas bond filed in this civil action on December 27, 1996 by Fireman's Fund Insurance Company, as surety, in the sum of $650,000.00, Bond No. SJR111 3329 9862 (the "Original Supersedeas Bond"); and (b) Upon agreement of the parties, the motion of Appellant for an order continuing the stay of execution and enforcement of the Default Judgment and increasing and amending, by substitution, the amount and the condition of the Original Supersedeas Bond that is now on deposit with the Clerk of this Court, during the pendency of the filing by Appellant of a petition for a writ of certiorari from the Supreme Court of the United States, seeking the review of the order entered by the Supreme Court of Wyoming on May 5, 1998 (the "Order Denying Petition for Rehearing"), denying Appellant's petition for a rehearing of the decision rendered on April 10, 1998 in *Fluor Daniel (NPOSR), Inc. v. Seward*, No. 97-18 (Wyo. Sup. Ct. April 10, 1998) ("Appeal No. 97-18"); and Appellee having appeared through and being represented by his counsel, Mark W. Gifford; and Appellant having appeared and being represented by its counsel, Donn J. McCall, of Brown, Drew, Massey & Sullivan; and Appellant and Appellee having informed and advised the Court of their agreement to a continuance of the stay of execution and enforcement of the Default Judgment conditioned upon the deposit and filing by Appellant with the Clerk of this Court of a substituted supersedeas bond in the sum of $700,000.00 to satisfy the Default Judgment, in full, together with interest, cost, and damages for delay, in the event Appellee should prevail in the proceedings before the Supreme Court of the United States; and the parties having reduced their agreement to writing and having filed a stipulation with the Court on June 2, 1998, regarding the deposit by Appellant with the Clerk of this Court of a substituted supersedeas bond in the sum of $700,000.00, which shall be held and retained in the custody of the Clerk of this Court during the period of time in which

Appellant is entitled to apply for a writ of certiorari from the Supreme Court of the United States and thereafter until its petition for a writ of certiorari is acted upon by the Court; and that Court having reviewed and considered the stipulation and being in all other respects fully informed and advised in the premises, and for good cause shown, it is

ORDERED that the motion of Appellee, David G. Seward, for an order allowing him to proceed with the collection of the Default Judgment and directing the Clerk of this Court to proceed with the collection of the Original Supersedeas Bond filed in this civil action on December 27, 1996 by Fireman's Fund Insurance Company, as surety, in the sum of $650,000.00, be, and it hereby is, dismissed upon agreement of the parties; and, it is further

ORDERED that the motion of Appellant, Fluor Daniel (NPOSR), Inc., for continuance of the stay of execution and enforcement of the Default Judgment, entered on October 7, 1996 by the Court in this civil action in favor of Appellee and against Appellant, be, and it hereby is, granted; and, it is further

ORDERED that the stay of execution and enforcement of the Default Judgment, be, and it hereby is, continued pending the outcome and disposition of Appellant's filing of a petition for a writ of certiorari from the Supreme Court of the United States seeking the review of the Order Denying Petition for Rehearing, entered on May 5, 1998 by the Supreme Court of Wyoming in Appeal No. 97-18, upon and subject to the deposit by Appellant with the Clerk of this Court of a new and substituted supersedeas bond, increasing the amount of the Original Supersedeas Bond from the sum of $650,000.00 to the sum of $700,000.00, which shall be conditioned as provided in this order; and, it is further

ORDERED that Appellant, Fluor Daniel (NPOSR), Inc., be, and it hereby is, ordered and authorized to deposit with the Clerk of this Court, and to substitute in the place of the Original Supersedeas Bond in the sum of $650,000.00, a

new supersedeas bond in the sum of $700,000.00, which shall be submitted and filed by Appellant, Fluor Daniel (NPOSR), Inc., as principal, and Fireman's Fund Insurance Company, as surety, and which shall be expressly conditioned on the satisfaction of the Default Judgment, in full, together with interest, costs, and damages for delay, upon the failure of Appellant to either (a) make application for a writ of certiorari from the Supreme Court of the United States authorizing the review of the Order Denying Petition for Rehearing, entered on May 5, 1998 by the Supreme Court of Wyoming in Appeal No. 97-18, within the ninety-day period of time required by 11 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States, (b) obtain an order of the Supreme Court of the United States granting Appellant's petition for a writ of certiorari authorizing the review of the Order Denying Petition for Rehearing, entered on May 5, 1998 by the Supreme Court of Wyoming in Appeal No. 97-18, or (c) make its plea good in the Supreme Court of the United States; or, in the alternative, upon Appellant's satisfaction in full of the Default Judgment, as modified, together with interest, costs, and damages for delay, as the Supreme Court of the United States may adjudge and award; and, it is further

ORDERED that upon the Court's acceptance and approval of the new and substituted supersedeas bond in the sum of $700,000.00, filed and deposited by Appellant, Fluor Daniel (NPOSR), Inc., as principal, and Fireman's Fund Insurance Company, as surety, with the Clerk of this Court, the stay of execution and enforcement of the Default Judgment, entered on October 7, 1996 by the Court in this civil action in favor of Appellee and against Appellant, be, and the same hereby will be, continued pending the outcome and disposition of Appellant's filing of a petition for a writ of certiorari from the Supreme Court of the United States seeking the review of the Order Denying Petition for Rehearing, entered on May 5, 1998 by the Supreme Court of Wyoming in Appeal No. 97-18, and that the Clerk of this Court be, and she hereby will be, authorized and directed to thereupon release to the possession of Appellant, in care of

its counsel, Donn J. McCall of Brown, Drew, Massey & Sullivan, Suite 800, 123 West First Street, Casper, Wyoming, the Original Supersedeas Bond, Bond No. SJR111 3329 1986, filed on December 27, 1996 in this civil action by Fireman's Fund Insurance Company, as surety, in the sum of $650,000.00; and, it is further

ORDERED that the Clerk of this Court be, and she hereby is, appointed as the agent for Fireman's Fund Insurance Company upon whom any papers affecting the liability of Appellant, Fluor Daniel (NPOSR), Inc., on the new and substituted supersedeas bond in the sum of $700,000.00 may be served.

DATED this 18th day of June, 1998.

BY THE COURT:
s/ Dan Spangler
DAN R. SPANGLER
District Court Judge

Approved as to Form:

s/ Mark W. Gifford
Mark W. Gifford
Attorney for Plaintiff and
Appellee, David G. Seward

s/ Donn J. McCall
Donn J. McCall
Attorney for Defendant and
Appellant, Fluor Daniel
(NPOSR), Inc.

APPENDIX M -- SUPERSEDEAS BOND FILED WITH AND APPROVED BY THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR NATRONA COUNTY, WYOMING ON JUNE 18, 1998

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525A

Bond # 11141571734

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

FILED
JUN 18 1998
Sue Pate
Clerk of District Court
By s/ Wanda Davis
Deputy

SUPERSEDEAS BOND

Whereas Fluor Daniel, (NPOSR), Inc. ("Appellant"), as principal, and Fireman's Fund Insurance Company, as surety, are held and firmly bound to the plaintiff in the above-entitled action, in the sum of SEVEN HUNDRED THOUSAND and No/100 DOLLARS ($700,000.00), to be paid to David G. Seward, plaintiff and appellee ("Appellee"), his re-

spective heirs, executors, administrators, or assignees, for which payment well and truly to be made we bind ourselves, our successors or assigns, jointly and severally, by this instrument.

WHEREAS, on October 7, 1996, the Seventh Judicial District Court in and for Natrona County, State of Wyoming, entered a default judgment in this civil action in favor of Appellee and against Appellant in the sum of $562,489.00, together with interest at the legal rate of ten percent (10%) per annum from the date of the judgment until paid (the "Judgment"); and

WHEREAS, on December 12, 1996, the Seventh Judicial District Court in and for Natrona County, State of Wyoming, entered an order in this civil action denying the motion of Appellant to set aside the entry of default against Appellant and the Judgment (the "Order Denying Motion to Set Aside Entry of Default and Default Judgment"); and

WHEREAS, on December 27, 1996, Appellant filed a Notice of Appeal from the Judgment and the Order Denying Motion of Appellant to Set Aside Entry of Default and Default Judgment, to the Supreme Court of Wyoming; and

WHEREAS, on April 10, 1998, the Supreme Court of Wyoming rendered its decision affirming the Judgment and the Order Denying Motion to Set Aside Entry of Default and Default Judgment; and

WHEREAS, on May 5, 1998, the Supreme Court of Wyoming denied Appellant's petition for a rehearing of the decision rendered by that Court on April 10, 1998 (the "Order Denying Petition for Rehearing"), and on May 6, 1998, issued its mandate affirming the Judgment entered by the Seventh Judicial District Court in and for Natrona County, State of Wyoming, and awarding costs to Appellee; and

WHEREAS, Appellant intends to file a petition for a writ of certiorari from the Supreme Court of the United States

to the Supreme Court of Wyoming, seeking a review of the Order Denying Petition for Rehearing; and

WHEREAS, pursuant to 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States, Appellant has until August 3, 1998, or ninety (90) days from the date of the entry by the Supreme Court of Wyoming of the Order Denying Petition for Rehearing, in which to file a petition for a writ of certiorari from the Supreme Court of the United States seeking a review of the Order Denying Petition for Rehearing; and

WHEREAS, Appellant desires to stay execution and enforcement of the Judgment pursuant to the mandate issued by the Supreme Court of Wyoming on May 6, 1998, during the period of time in which it is entitled to apply for writ of certiorari from the Supreme Court of the United States and thereafter until its petition for writ of certiorari is acted upon by that Court;

NOW, THEREFORE, the condition of this obligation is that if Appellant shall prosecute its petition for a writ of certiorari from the Supreme Court of the United States and shall satisfy the Judgment in full, together with interest, costs, and damages for delay, upon its failure to either (a) make application for a writ of certiorari from the Supreme Court of the United States within the ninety (90) day period of time allotted therefor pursuant to 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States, (b) obtain an order of the Supreme Court of the United States granting its petition for a writ of certiorari authorizing the review of the Order Denying Petition for Rehearing entered by the Supreme Court of Wyoming, or (c) make its plea good in the Supreme Court of the United States; or, in the alternative, if Appellant shall satisfy in full such Judgment as modified, together with interest, costs, and damages for delay, as the Supreme Court of the United States may adjudge and award, then this obligation shall be void; otherwise, it shall remain in full force and effect.

Fireman's Fund Insurance Company, as surety, hereby submits itself to the jurisdiction of the Seventh Judicial District Court in and for Natrona County, State of Wyoming, and irrevocably appoints the Clerk thereof as its agent upon whom any papers affecting the liability of Appellant on this obligation may be served.

DATED this 17th day of June, 1998.

PRINCIPAL:

FLUOR DANIEL (NPOSR), INC.,
Appellant and Principal

By: s/ Donn J. McCall
DONN J. McCALL
Brown, Drew, Massey & Sullivan
Casper Business Center
Suite 800
123 West First Street
Casper, Wyoming 82601
(307) 234-1000

Attorneys for Fluor Daniel
(NPOSR), Inc.

SURETY:

FIREMAN'S FUND INSURANCE
COMPANY, Surety

By: s/ R. N. Barnard
Print Name: R. N. Barnard
Its: Attorney-in-Fact

Address of Surety:
7887 East Belleview Avenue
Englewood, Colorado 80111

GENERAL POWER OF ATTORNEY **FIREMAN'S FUND INSURANCE COMPANY**

KNOW ALL MEN BY THESE PRESENTS: That FIREMAN'S FUND INSURANCE COMPANY, a Corporation duly organized and existing under the laws of the State of California, and having its principal office in the County of Marin, State of California, has made, constituted and appointed, and does by these presents make, constitute and appoint R. N. BARNARD, W. N. BARNARD, DANIEL R. KELLY, jointly or severally

CASPER, WY

its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, seal, acknowledge and deliver any and all bonds, undertakings, recognizances or other written obligations in the nature thereof ----------

and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises.

This power of attorney is granted pursuant to Article VII, Section 45 and 46 of By-laws of FIREMAN'S FUND INSURANCE COMPANY now in full force and effect.

"Article VII. *Appointment and Authority Resident Secretaries, Attorney-in-Fact and Agents to accept Legal Process and Make Appearances.*

Section 45, *Appointment.* The Chairman of the Board of Directors, the President, any Vice-President or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice-President, may, from time to time, appoint Resident Assistant Secre-

taries and Attorneys-in-Fact to represent and act for and on behalf of the Corporation and Agents to accept legal process and make appearances for and on behalf of the Corporation.

Section 46. *Authority.* The Authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment. Any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment."

This power of attorney is signed and sealed under and by the authority of the following Resolution adopted by the Board of Directors of FIREMAN'S FUND INSURANCE COMPANY at a meeting duly called and held on the 7th day of August, 1984, and said Resolution has not been amended or repealed:

"RESOLVED, that the signature of any Vice-President, Assistant Secretary, and Resident Assistant Secretary of this Corporation, and the seal of this Corporation may be affixed or printed on any power of attorney, on any revocation of any power of attorney, or on any certificate relating thereto, by facsimile, and any power of attorney, any revocation of any power of attorney, or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Corporation."

IN WITNESS WHEREOF, FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its Vice-President, and its corporate seal to be hereunto affixed this 26th day of February, 1997.

FIREMAN'S FUND INSURANCE COMPANY

[SEAL] By s/ M. A. Mallonee
Vice President

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARTIN)

On this 26th day of February, 1997, before me personally came M.A. Mallonee, to me known, who, being by me duly sworn, did depose and say: that he is the Vice-President of FIREMAN'S FUND INSURANCE COMPANY, the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year herein first above written.

s/ A. Kreiger
Notary Public

A. KRIEGER
COMM. #1045112
NOTARY PUBLIC-CALIFORNIA
MARIN COUNTY
My Comm. Expires Mar.20, 1999

CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

I, the undersigned, Resident Assistant Secretary of FIREMAN'S FUND INSURANCE COMPANY, a CALIFORNIA Corporation, DO HEREBY CERTIFY that the foregoing and attached POWER OF ATTORNEY remains in full force and has not been revoked; and furthermore that Article VII, Sections 45 and 46 of the By-laws of the Corporation, and the Resolution of the Board of Directors; set forth in the Power of Attorney, are now in force.

Signed and sealed at the City and County of San Francisco. Dated the 17th day of June, 1998.

[SEAL]

s/ Loretta E. A---------
Resident Assistant Secretary

APPROVAL AND ACCEPTANCE OF SURETY AND AMOUNT

The foregoing Supersedeas Bond is approved by the above-entitled Court, this 18th day of June, 1998.

BY THE COURT:

s/ Dan Spangler
Dan R. Spangler
District Court Judge